United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR PETITIONER AND JOINT APPENDIX.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

343

No. 20,350

PERSIAN GULF OUTWARD FREIGHT CONFERENCE,

Petitioner,

v.

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF FEDERAL MARITIME COMMISSION ORDER.

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Statement of Questions Presented *

(1) Was the Commission's order of July 22, 1966, improper because the Commission has no authority to issue a cease and desist order in this case without a full evidentiary hearing, under sections 15, 22 and 23 of the Shipping Act, 1916, as amended (46 U.S.C. 814, 821, and 822), Sections 5 and 7 of the Adiminstrative Procedure Act (5 U.S.C. 1004 and 1006), and the Commission's own Rules of Practice and Procedure (46 CFR 502.142)?

(2) Was the Commission's decision of July 22, 1966, contrary to section 15 of the Shipping Act, 1916, in that it found that the Conference's rate structure was unauthorized by the Conference's approved agreement as a matter of law?

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* The Questions Presented were the subject of a Joint Stipulation between the parties which was approved by the Court by Order of September 22, 1966 (JA 20).

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TABLE OF CASES CITED

* Cases or authorities chiefly relied upon are marked by asterisks.

Statutes Cited

Other Authorities Cited

Jurisdictional Statement

This petition is to review a final order of the Federal Maritime Commission (hereinafter referred to as "Commission"), served on July 22, 1966 in the Commission's Docket No. 66-27, *The Persian Gulf Outward Freight Conference (Agreement 7700)—Establishment of a Rate Structure Providing for Higher Rate Levels for Service via American-Flag Vessels versus Foreign-Flag Vessels,* under the Shipping Act of September 7, 1916, c.451, 39 Stat. 728, as amended, 46 U.S.C.A. §§ 801, 842 (hereinafter referred to as "Act"). Review is sought and jurisdiction of this court is based upon the provisions of the Act of December 29, 1950, c.1189, Section 3, 64 Stat. 1130, as amended, 5 U.S.C.A. § 1003.

Pleadings showing the existence of jurisdiction are found in a petition to review filed with this Court (JA 1*ff*).

Statement of Facts

The Persian Gulf Outward Conference, operating under a rate making agreement approved by the Federal Maritime Commission (Commission), is presently composed of American steamship companies in the trade. Prior to late 1959, the Conference, however, was composed of both American and foreign steamship lines.

The report and order of which review is sought in this proceeding relates to revisions in the Conference tariff which instituted two rates on some 500 items, one rate if the cargo was carried on American-flag vessels, and a second, lower, rate if the cargo was carried on a foreign-flag vessel.

The underlying fact situation in this trade has recently been before this Court in *Persian Gulf Outward Freight Conference* v. *F.M.C.,* No. 19322, Decided March 8, 1966, — U. S. App. D. C. —, 361 F. 2d 80.

That case arose when the foreign flag lines serving this trade withdrew from the Persian Gulf Outward Freight

Conference and reduced their rates and then later filed with the Commission for approval, pursuant to Section 15 of the Shipping Act, 1916, 46 U. S. C. § 814, a second rate-making agreement in the trade. The Conference filed a protest to the agreement submitted, but the Commission approved it, *Agreement No. 8900—Rate Agreement United States/ Persian Gulf Trade,* 8 F. M. C. 712 (1965), holding in the majority opinion of two Commissioners, that:

> "The facts show there is substantially no present or foreseeable competitive relation between the parties in regard to either ports served, cargoes carried, rates charged, or services to shippers. Lacking any conflicting competitive conditions, the basic premises of the initial decision [which disapproved the proposed agreement] vanish. The existence of two ratemaking associations in a single trade, by itself, is not a valid test for disapproving agreements under Section 15, and the suppositions as to re-formation of the presently approved Conference following disapproval, and of future strife and rate instability following approval, are not supported by fact or reason."

Admiral John Harllee, Chairman of the Commission concurred, saying:

> "As noted, the Conference, since they were priced out of the general cargo market by the rate war, are substantially limited to Government cargo [which must be carried on U.S.-flag vessels, 10 U. S. C. § 263]; the independents carry commercial cargo. So long as the Conference is unable or unwilling to meet prevailing independent rates, no conflict will exist between the groups." 8 F. M. C. at 727.

Commissioner Barrett dissented, upholding the Examiner's decision that the second ratemaking group should be disapproved. Commissioner Hearn did not participate in the decision.

The Conference appealed the decision in this Court, maintaining that they were in competition with the foreign-

flag 8900 group, but the Commission's decision was affirmed, in the above-cited case.

On November 10, 1965, the Conference filed an amendment to its agreement for approval, designated by the Commission Agreement No. 7700-9. The amendment would permit Conference members to act as agents for non-conference Lines.

In response to a Commission request, the Conference explained the proposal by letter of December 10, 1965, (Addendum 34) in part, as follows:

> "As you no doubt realize, the approval of the quoted language would not constitute approval under Section 15 of the agency arrangements which may be entered into. It merely insures that Agreement No. 7700 will not be an obstacle to such arrangements. If a party were to agree to act as a steamship agent for another carrier in the trade, any such agreement which fell within the purview of Section 15 would, of course, have to be filed with the Commission."

The 8900 group protested the proposed agreement, the Conference replied, and, by letter of January 17, 1966, the Commission commented, in part:

> "During our conversation on Friday, January 7, 1966, we expressed the belief that the protest filed by the '8900 Lines' against approval of Agreement 7700-9 would most likely be withdrawn if certain additional language were made part of that agreement. Specifically, we suggested the inclusion of the following new sentence at the end of Article 4, as amended:
>
> 'No such agency arrangements may be implemented prior to approval by the Federal Maritime Commission'" (Addendum 35).

Finally, in a letter of February 28, 1966, the Commission stated (Addendum 36):

> "In our letter of January 17, 1966, copy enclosed, we expressed the belief that the protest filed by the

> '8900 Lines' against approval of Agreement 7700-9 would most likely be withdrawn if certain additional language which we suggested in our letter were made a part of that agreement.
>
> "We have not received any word from you pertaining to the above matter. Further processing of Agreement 7700-9 is being held in abeyance pending advice from you as to the position of the parties to the agreement on the matter referred to.
>
> "Your early reply will be greatly appreciated."

With the proposed amendment "in abeyance," and the Commission's decision approving the 8900 group affirmed, in the above-cited case decided March 8, 1966, the Conference filed with the Commission, on March 10, 1966, effective March 11, 1966, a revision of its tariff providing two rates on some 500 items, one rate if the cargo was carried on American-flag vessels, and a second, lower rate if the cargo was carried on foreign-flag vessels. The American steamship lines which make up the Conference have chartered some foreign-flag vessels to carry at the foreign-flag rate, and have also, in one case, transferred owned foreign-flag vessels from other trades to the Persian Gulf trade to handle this traffic.

Two levels of rates were used, it can be shown, by an independent in this trade, and in the U. S./India trade. It was also used, it can be shown, in the North Atlantic trade before the war.

On April 19, 1966, the Commission instituted the present proceeding and ordered the Conference to show cause why the tariff revisions should not be declared unlawful and why the rates should not be stricken from the tariff.

The Commission, in its Order to Show Cause, specifically stated that:

> "This proceeding shall be limited to the submission of memoranda of law . . ." (JA 25)

The Conference submitted a memorandum of law, but protested that the Commission was not authorized to take action in this matter until it had held a full evidentiary hearing, under Sections 15, 22 and 23 of the Shipping Act, 1916, as amended, 46 U. S. C. §§ 814, 821 and 822, Sections 5 and 7 of the Administrative Procedure Act, 5 U. S. C. §§ 1004, 1006, and the Commission's own Rules of Practice and Procedure, 46 C. F. R. § 502.142.

Furthermore, the Conference pointed out that the rates it had filed were pursuant to its approved Section 15 Agreement which stated in Article 1:

> "This agreement covers the establishment and maintenance of agreed rates, charges and practices for or in connection with transportation of cargo by members of this Conference."

It pointed out that a full evidentiary hearing would show that the rates set by the tariff revision were nothing new, having been used in this trade and an adjacent one, as has been stated, as well as in the North Atlantic trade before the war. A memorandum of law in reply was filed by the Commission's Hearing Counsel, and the Commission heard oral argument on June 22, 1966.

By a Report and Order of July 22, 1966, of which review is sought herein, the Commission found that the rates contained in the Conference's challenged tariff were not authorized by the Conference's agreement, F. M. C. Agreement No. 7700, as amended, and ordered the Conference to cease and desist from carrying cargo at such rates prior to approval of the rate structure under Section 15 of the Shipping Act, 1916; and further ordered the rates in question stricken from the Conference's tariff.

The Report is signed by Commissioners Harllee, Patterson and Hearn. Commissioners Barrett and Day did not participate (JA 6).

The Conference thereupon filed its Petition for Review of this Commission action (JA 1).

Statutes Involved

The relevant part of all statutes involved are set out in the appendix.

Statement of Points

1. The Commission's Order to strike items from the Conference tariff and to cease and desist from charging these rates was unauthorized and contrary to law because the Conference was not given an evidentiary hearing before the Order was issued.

A. Section 23 of the Shipping Act, 1916, as amended.

B. The Administrative Procedure Act and the Commission's Rules of Practice and Procedure.

C. The Commission has consistently recognized that it does not have the power to issue cease and desist orders without full evidentiary hearings and the Courts agree.

2. The Commission's decision that the rates set by the Conference at issue here were in violation of section 15 of the Shipping Act, 1916, as amended, was in error.

A. Section 15 specifically states that it is inapplicable to tariff rates agreed upon by approved conferences.

B. The setting of these rates was authorized by the Conference's approved agreement.

C. The rates were competitive and not anti-competitive in nature.

D. Project Rates.

E. If there were any doubt that the rates set did not violate section 15, an evidentiary hearing would have settled the matter.

Summary of Argument

This case involves the efforts of an American-Flag Steamship Conference, which operates under a Commission-approved ratemaking agreement, to compete with a second group of carriers in the trade, all of whose vessels fly foreign flags. Because the Conference was using American ships with American crews its operating costs were substantially higher and the foreign-flag group was able to offer lower freight rates on many items. In order to compete for these cargoes the Conference members brought foreign-flag vessels into the trade and revised the Conference tariff so that on a number of commodities it offered one rate if the commodity was carried on an American-flag ship and a different, lower rate if the commodity was carried on a foreign-flag Conference ship.

The Federal Maritime Commission issued a show cause order which required the Conference to show why it should not be ordered to strike these items from its tariff and cease and desist from implementing them. The order specifically stated that the proceeding would be limited to memoranda of law and oral argument.

The Commission issued its order to strike and cease and desist a month after oral argument, without taking any evidence at all. The record does not contain a copy of the tariff at issue or a copy of the Conference Agreement which the Commission held did not authorize the setting of the questioned rates. It did not contain, in particular, evidence of the methods of setting rates that were used in this and adjacent trades, or any other evidence of the factual background, with which to interpret the provisions of the Conference Agreement, although the Conference pointed out in its memoranda of law and at oral argument that it was impossible to make such a determination as the Commission proposed without such facts. The Conference specified the facts it planned to develop at an evidentiary hearing and explained their clear relevance to

the issues presented but the Commission refused to hold an evidentiary hearing and nevertheless issued its cease and desist order.

The Commission's decision was contrary to law because section 23 of the Shipping Act, 1916, as amended, states that orders shall be issued "only after full hearing" and no such hearing was accorded the Conference here. Furthermore it is clear that the Commission's proceeding was subject to sections 5 and 7 of the Administrative Procedure Act and in fact the Commission's Rules of Practice and Procedure require this. Section 7(c) of the Administrative Procedure Act accords to the Conference the right to present oral or documentary evidence, to submit rebuttal evidence and to conduct such cross-examination as may be required. The Conference was denied this right in this proceeding. The Commission states that there is no dispute as to the facts—which is simply not the case—and that "the only issue involved in this proceeding" is "the legal issue of whether or not the two level rate system is authorized by the approved Agreement 7700" (JA 12).

The Commission thinks that the rates the Conference has set are something new and surprising and that they are analogous to fact situations where the Commission has held that a "new scheme", "a new course of conduct", and "a new means of regulating competition" were not authorized by approved Conference agreements. The Conference can show, given an evidentiary hearing, that there is nothing new about the rates it has set, in this trade and an adjacent trade. Furthermore, the Commission has held that the thrust of section 15 is directed against "anti-competitive agreements" and it is the purpose of the rates the Conference has set to make it more competitive with a competing group of carriers so that by no stretch of the imagination could they be characterized as an "anti-competitive agreement".

Consequently the facts the Conference wishes to show are a necessary part of any proper "legal determination" of the issue the Commission says is presented in this proceeding.

The Commission's decision that the rates in question here constitute an unauthorized section 15 agreement is in error.

In the first place, section 15 specifically excepts tariff rates set by approved Conferences from its scope.

Secondly, it is clear that the Conference Agreement covers the rates set here and this would be demonstrated, if there were any doubt, if the Conference were allowed to present its evidence.

Moreover, even if this were not true, the rates in question increase competition in the trade and are in no sense anti-competitive and thus, under Commission decisions, not contrary to law.

Most conferences approved by the Commission offer "project rates" which are lower rates than their regular tariff rates and are applied to cargo destined for certain industrial developments. This is another factor which shows that the setting of two rates on a given commodity by a Conference is not illegal.

It can be seen, then, that the Commission was without authority to issue the Order, as to which review is sought herein, without an evidentiary hearing, and that the Conference rates do not constitute an unfiled section 15 agreement.

ARGUMENT

I.

The Commission's order was unauthorized.

The Commission, in its Report and Order, held that the tariff revisions in question were not authorized by the Conference's agreement and constitute an unfiled agreement required to be filed for prior approval by the Commission under Section 15 of the Shipping Act, 1916, 46 U. S. C. 814, and ordered the Conference to strike the items from the tariff and that it

> "cease and desist from carrying out prior to Commission approval its two-level system of rates based on vessel flag" (JA 18).

The Commission is not authorized to issue such an order until it has held a full evidentiary hearing under §§ 15, 22 and 23 of the Shipping Act, 46 U. S. C. 814, 821 and 822, §§ 5 and 7 of the Administrative Procedure Act, 5 U. S. C. 1004, 1006, and the Commission's Rules of Practice and Procedure, 46 C. F. R. 502.142. In this case, as has been seen, the Commission limited its proceeding to the submission of memoranda of law.

Section 23 of the Shipping Act, 1916, 46 U. S. C. 822, states:

> "Orders of the [Commission] relating to any violation of this Act shall be made only after full hearing, and upon sworn complaint or in proceedings instituted of its own motion."

The Commission's Rules of Practice and Procedure require:

> "46 C. F. R. 502.142. *Hearings required by statute.* In * * * adjudication proceedings in which a hearing is required by statute, formal hearings shall be conducted pursuant to section 7 of the Administrative Procedure Act."

This is in conformity with Section 5 of the Administrative Procedure Act, 5 U. S. C. 1004, which provides:

> "In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing * * * (b) The agency shall afford all interested parties opportunity for * * * (2) * * * hearing, and decision upon notice and in conformity with sections 7 and 8."

Section 7(c) of the Administrative Procedure Act, 5 U. S. C. 1005(c) provides:

> "* * * Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

These passages from the Administrative Procedure Act are intended to be applicable. In this case § 23 requires that orders "shall be made only after full hearing."

In *Morgan* v. *U. S.*, 298 U. S. 468, 481 (1936), the Supreme Court explained the requirement of a statute specifying "full hearing" in the following words:

> "The requirement of a 'full hearing' has obvious reference to the tradition of judiciary proceedings in which evidence is received and weighed by the tryer of the facts * * * The 'hearing' is the hearing of evidence and argument." See also *Morgan* v. *U. S.*, 304 U. S. 1 (1938).

The *Attorney General's Manual on the Administrative Procedure Act* (1947) explained that such a statute makes the provisions of §§ 5, 7 and 8 of the APA applicable. The manual states at p. 42:

> "Other statutes authorizing agency action which is clearly adjudicatory in nature, such as the revocation of licenses, specifically require the agency to hold a hearing but contain no provision expressly requiring decision 'on the record'. For example, the Secretary of Agriculture may issue *cease and desist*

> *orders* under section 312 of the Packers and Stockyards Act, 1921 (7 U. S. C. 213), only after 'notice and *full hearing*', and these orders are made reviewable under the Urgent Deficiencies Act. The Department of Agriculture has always assumed that these orders must be based upon the evidentiary record made in the hearing, and the courts have held that upon review the validity of an order issued under the Packers and Stockyards Act must be determined upon the administrative record. Tagg Bros. & Moorhead v. United States, 280 U. S. 420 (1930). *It seems clear that administrative adjudication exercised in this context is subject to sections 5, 7 and 8.*" (Emphasis supplied)

Davis emphasizes that such a statutory requirement must be respected even when the only questions presented are legal questions, as the Commission alleges herein:

> "The statutory requirement of hearing should be respected when substantial issues are presented.
>
> "The argument that a hearing may be dispensed with because the only questions are legal questions, not factual ones, and because *FCC* v. *WJR*, 337 U. S. 265, 69 S. Ct. 1097, 93 L. Ed. 1353 (1949) holds that oral arguments may be dispensed with on issues of law, is inapplicable because the argument does not reach the statutory requirement." Davis, Administrative Law Treatise, § 6.05 (Supp. 1965 at 241).

Section 23 of the Shipping Act requires that Commission orders be made only after full hearing. Thus, it is clear that the Administrative Procedure Act requires that adjudication exercised in this context be in conformity with §§ 5, 7 and 8 of the APA. Both the House and the Senate reports on the Administrative Procedure Act show that Section 7 of the act requires a hearing in such a case as this. S. Rep. No. 752, 79th Cong., 1st Sess. (1945), H. R. Rep. No. 1980, 79th Cong., 2d Sess. (1946). Both said:

> "Except as applicants for a license or other privilege may be required to come forward with a prima facie showing, no agency is entitled to presume that

> the conduct of any person or status of any enterprise is unlawful or improper." (S. Doc. No. 248, 79th Cong., 2d Sess. (1946) at 208, 270.)

The Commission's decision presumes, as did the Order To Show Cause, that there is no dispute as to the facts despite the assertions of the conference to the contrary, and its specification of the evidence that would support its position. The Commission refused to receive any evidence from the conference before issuing its order.

The Commission's position, in the light of Section 23 of the Shipping Act and the Administrative Procedure Act, is clearly improper.

The Final Report of the Attorney General's Committee on Administrative Procedure, 1941, which was relied on heavily by the framers of the Administrative Procedure Act, points out that it is an essential element of a fair administrative hearing that the forum be prepared to receive and consider the relevant evidence offered by the party against whom adverse action is taken.

> "Before adverse action is to be taken by an agency, whether it be denying privileges to an applicant or bounties to a claimant, before a cease-and-desist order is issued or privileges or bounties are permanently withdrawn, before an individual is ordered directly to alter his method of business, or before discipline is imposed upon him, the individual immediately concerned should be apprised not only of the contemplated action with sufficient precision to permit his preparation to resist, but, before final action, he should be apprised of the evidence and contentions brought forward against him so that he may meet them. He must be offered a forum which provides him with an opportunity to bring his own contentions home to those who will adjudicate the controversy in which he is concerned. *The forum itself must be one which is prepared to receive and consider all that he offers which is relevant to the controversy.*
>
> "These may properly be termed the fundamentals ordinarily requisite to a fair hearing leading to

> adverse action against an individual." *Final Report of Attorney General's Committee on Procedure*, 1941, at 62.

But there is another, equally important, consideration. The Commission says that in this proceeding purely "legal" questions are presented. But if this is so, it is for the courts, rather than the agency, to decide the law in the last analysis, under Section 10(e) of the APA, as both the House and Senate Reports state:

> "This section provides that questions of law are for courts rather than agencies to decide in the last analysis * * *." S. Rep. No. 752, 79th Cong., 1st Sess. (1945); H. R. Rep. No. 1980 (1946); S. Doc. No. 248, 79th Cong., 2d Sess (1946) 214, 278

Furthermore, the courts must decide questions of law independently as Rep. Walter, the sponsor of the bill in the House, pointed out in explaining the bill on May 24, 1946:

> "Subsection (e) of section 10 requires courts to determine independently all relevant questions of law, including the interpretation of constitutional or statutory provisions and the determination of the meaning or applicability of any agency action." S. Doc. No. 248, 79th Cong., 2d Sess. (1946), 370.

It is impossible to see how the Court can make an independent determination of such "legal" questions on the record before it. The record does not even include the tariffs ordered to be withdrawn. It does not include a copy of the agreement, F. M. C. Agreement No. 7700, which the Commission maintains does not authorize the rates contained in the challenged tariff, and of course, it does not contain any information as the rate making customs of the trade involved, which the conference considers to be a necessary element in any decision as to whether Agreement No. 7700 as approved by the Commission was intended to cover the setting of the rates challenged here.

The Court cannot, as it might in the usual case in which an evidentiary record is available, rely on the expertise of

the Commission. For the Commission maintains that the question presented is a purely legal one and as to such questions, the Commission is not the best authority, as was said in *Chicago, M. St. P. & P.R. Co.* v. *Aloette Peat Products,* 253 F. 2d 449, 454 (9th Cir. 1958) as follows:

> "Conclusions of law by the Commission, while entitled to respectful consideration by the Courts, do not have the same finality as its findings of fact. *Levinson* v. *Spector Motor Co.,* 330 U. S. 649, 67 S. Ct. 931, 91 L. Ed. 1158."

If the Court is going to make an independent interpretation of §§ 15 and 23 of the Shipping Act, 1916, as they are to be applied to the situation presented here, it must have a factual framework in which to make its decision, as Professor Jaffe points out:

> "Interpretation is not made in the abstract; it is made on the basis of a case. The Court can deal with only the factors presented in that case. It cannot interpret a significance of other factors until it is made aware of them." Jaffe, *Judicial Control of Administrative Action.* 563-4 (1965).

Accordingly, in order for the Court to make its independent determination of the legal questions the Commission says it has decided it must have a record before it which it does not have in this case.

What the Commission is attempting to do in this case is to get by judicial interpretation powers denied it by statute. Section 9(a) of the Administrative Procedure Act, 5 U. S. C. 1008(a) is designed to deal with such an attempt, as Rep. Walter pointed out in explaining the provision:

> "The basic premise of the section, if I may repeat, is that agencies are not authorized to invent sanctions or relief or to attempt to apply or grant them beyond the limitations of authority within which they operate." S. Doc. No. 248, 79th Cong., 2d Sess. (1946) at 368.

Under Section 23 of the Shipping Act, the Commission may not issue orders except after full evidentiary hearing, and it should not be allowed to expand its powers through the courts. The Interstate Commerce Commission recognized this in *Frozen Food Express, Extension-Indiana & Ohio,* 1966 Federal Carriers Cases ¶ 35977 (January 11, 1966).

> "The entry of a cease and desist order, however, requires, under section 204(c) 'notice and hearing' which applicant did not receive in this proceeding. In such a case, section 9(a) of the Administrative Act, to the effect that
>
> 'No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law * * *.'
>
> clearly renders the recommended entry of a cease and desist order here ineffective and a nullity."

An extended discussion of this requirement is found in Note, *Necessity For Hearing Before Enforcing Order of Interstate Commerce Commission,* 43 Yale L. J. 1300 (1934) and an analysis of the statutory provisions in this regard is found in *Chicago Junction Case,* 264 U. S. 258, 265 n. 9, 10(1924).

It is thus clear that a full evidentiary hearing cannot be dispensed with before the Commission makes a finding of violation of Section 15, and that such a finding is necessary before the Commission may issue an order in this matter.

The Commission has recognized that it does not have the power to issue cease and desist orders without full evidentiary hearings by asking Congress for this power at least four times, in 1961, 1962, 1963 and 1965.

When the Shipping Act, 1916, was amended in 1961, the Secretary of Commerce, in a letter appended to the House Report on the amendments asked for this power in a section entitled "Additional Recommendations of the

Department and the Board" [now Commission]. The letter said:

> "1. The Board should be given the power to enter cease and desist orders of an interlocutory nature prior to the completion of full evidentiary hearings. • • •
>
> "This recommendation is designed to enable the Board to act more swiftly in protection of the public interest where acts of questionable legality are put into issue before the Board, either by sworn complaint of an injured party, or by the Board on its own motion. Sometimes the questionable acts may have an important and adverse impact upon certain persons or interests. It is believed desirable that, instead of awaiting the termination of full administrative proceedings, including hearing, decision by the examiner, exceptions thereto, argument before the Board, and decision by the Board, the Board should have the power to maintain or restore the status quo upon a prima facie showing of irreparable damage, substantial injury to the public interest, or little likelihood of success on the merits." H.R. Rep. No. 498, 87th Cong. 1st Sess. (1961) p. 22.

Again, in its Annual Report for the Fiscal Year 1962, transmitted November 30, 1962, the Federal Maritime Commission asked for this power saying:

> "6. This recommendation would enable Commission to maintain the status quo where conduct of questionable legality is under review by the Commission, and there is occurring meanwhile substantial injury to the public interest, or irreparable harm to public or private interests. The power sought is similar to that now possessed by other regulatory agencies. *As noted under Litigation, the U. S. Court of Appeals for the District of Columbia has recently held that the Commission lacks such authority.*" Annual Report, 1962, p. 22. (Emphasis added.)

Under "litigation", the Commission cited the case:

> "*Trans-Pacific Freight Conf. of Japan, et al.* v. *F. M. C. and U. S. A.* [112 U. S. App. D. C. 290], 302 F 2d 875 (D C Cir), in which it was held that

the Commission lacks the power to issue an interim cease and desist order to maintain the status quo pending its findings and decision on a controversy before it" Annual Report, 1962, p. 19.

In this case, this Court said:

"Congress has repeatedly demonstrated that it knows how to make an express delegation of authority to issue interim cease and desist orders when it so desires. See, e.g., 15 U. S. C. A. § 45(b) (Federal Trade Commission); 16 U. S. C. A. § 820 (Federal Power Commission); 29 U. S. C. A. § 160(c) (National Labor Relations Board); see also Shipping Act § 17, 46 U. S. C. A. § 816. Frequently, Congress has expressly provided that an agency can obtain this form of relief by applying to an appropriate District Court. See, e.g., 15 U. S. C. A. §§ 53(a), 68e(b), 69g(b), 70f (Federal Trade Commission); 49 U. S. C. A. §§ 5(8), 43 (Interstate Commerce Commission).

• • •

"We will not lightly assume that Congress has attempted to confer injunctive powers on this or any other administrative agency.

"Our examination of the statute and the administrative interpretation of it does not support the Board's contention that Congress has granted it the authority it has here sought to exercise." 302 F. 2d 879-880.

In the following year, the Commission's Annual Report for the fiscal year 1963, of August 15, 1963, stated that its efforts to secure this bill were continuing:

"*Legislative Recommendations.*—All but two of the legislative recommendations contained in the Commission's report for fiscal year 1962 were incorporated into draft bills which have been submitted for clearance within the executive branch. The Commission is anxious that these bills receive the attention of the Congress at an early date.

"Not submitted as yet are the following two proposals which are under study within the Commission: • • •" [The bill giving the Commission

power to issue cease and desist orders prior to a full evidentiary hearing was not one of the two.] (Annual Report, 1963, p. 24.)

Two years later, on May 27, 1965—less than a year before the Order to Show Cause in this proceeding, and well after the decision in every court case cited by the Commission in support of its decision—Admiral Harllee, the Chairman of the Commission, appeared before Senator Douglas, at hearings of the Subcommittee on Federal Procurement and Regulation of the Joint Economic Committee and stated that the Commission did not have this power and was continuing to ask Congress for it. The exchange was as follows:

"Admiral Harllee. Well, actually, this is the one piece of legislative authority that we are asking. We don't have power, as a matter of fact, to take—

"Chairman Douglas. You don't have power to suspend.

"Admiral Harllee. To suspend. We don't have this power. We don't have power to take any action until after notice and hearing.

"Now, this came up with regard to the Latin American surcharge, where there was a Latin American surcharge which was imposed—and, again, this case is before us for adjudication.

"We sought an injunction in the case, for the reasons that—the general type of reason that you have outlined with regard to Sapphire.

"The court, after rather lengthy deliberations, and some compliments to our Solicitor's Office on it—Mr. Moskowski's office—denied our injunction primarily on the basis that it was a matter of equity, and we would have to carry forward the burden of proof in the case which there wasn't really time to do.

"We, therefore, are seeking the type of injunctive power, or the type of power to go to a court and not have to carry the burden, but rather be credited with the expertise of forming an initial opinion, which would do the type of thing you have in mind.

"Chairman Douglas. Get a cease-and-desist order.

> "Admiral Harllee. Yes. And we are seeking this type of legislative power. It is clear to us, after the loss of this case—we have only lost two, actually, out of a great many—that we should seek this power.
>
> "So we actually—regardless of what you may say about this case, *we don't have the power to do anything different at this time. We are seeking that power*" (Emphasis added). Hearings before the Subcommittee on Federal Procurement and Regulation of the Joint Economic Committee, 89th Cong., 1st Sess., pp. 384-385 (May 27, 1965).

The case Admiral Harllee referred to was *F. M. C.* v. *Atlantic & Gulf/Panama Canal Zone, et al.*, 241 F. Supp. 766 (S. D. N. Y. 1965). In that case, the Conference had imposed a surcharge on cargo because of a longshoremen's strike, and in the Commission's Docket No. 65-7, *Imposition of Surcharge at United States Atlantic & Gulf Ports,* the Commission instituted a proceeding to investigate—as in the present case—possible violation of Section 15, and other sections of the Shipping Act, 1916.

The Commission went into U. S. District Court to seek an injunction to enjoin collection of the surcharge. The Commission explained, in its final opinion in the case why it took that action:

> "*In the absence of the authority to suspend rates, pendente lite,* the Commission sought an injunction against respondents' imposition of the surcharges in order to maintain the status quo until this proceeding could be completed." Docket 65-7, *supra,* F. M. C. (1966) p. 3, n. 3 (emphasis in part, added).

The Court declined to issue the injunction. Tenney, D. J., said:

> "In the case of the Commission, not only has Congress not authorized it to issue cease and desist orders, but, in addition, as distinguished from other regulatory agencies (see, e.g., 15 U. S. C. § 53(a) (1963) (Federal Trade Commission); 29 U. S. C. § 160(j) (1956) (National Labor Relations Board)),

see Note, Interim Injunctive Relief Pending Administrative Determination, 49 Colum L. Rev. 1124 n. 3 (1949)) Congress has not specifically authorized it to obtain this interim injunctive relief by application to an appropriate District Court.

• • •

"Accordingly, what the Court is doing herein is not to disrupt the regulatory and rate scheme of an agency (Arrow Transp., supra), or to invest the Commission with a cease and desist power that it was not granted pursuant to statute (Trans-Pacific Freight Conference of Japan, supra); rather, the Court is exercising its inherent power, not that of the Commission, pursuant to 28 U. S. C. § 1337 (1962) to prevent irreparable harm and maintain the status quo pending an administrative decision, applying traditional concepts of equity jurisprudence. The Commission, in its petition, alleges violations of the Shipping Act. Accepting those allegations as true for the purposes of a determination as to jurisdiction, I believe that the Court has both the power to act and the duty to do so as well.

"However, having decided that this Court is vested with jurisdiction, I approach what I perceive to be the main obstacle to the granting of the relief herein, namely, whether the Commission has made the requisite showing to entitle it to the drastic remedy of a preliminary injunction." 241 F. Supp. at 775-77.

Thus, over the years, the Federal Maritime Commission repeatedly admitted that it does not have the power to issue cease and desist orders, both by direct statement and by requesting the power of Congress. Moreover, the fact that Congress failed to give the Commission this power when it requested it at the time of the 1961 amendments to the Shipping Act, or since, is an eloquent demonstration that Congress did not intend the Commission to have this power. The Courts have accordingly recognized that where the Commission has failed to give a full evidentiary hearing, it may not issue cease and desist orders.

Nevertheless the Commission dismisses the contention of the Conference that the Commission may not issue cease

and desist orders prior to a full evidentiary hearing as "without merit" (JA 15). The Commission dismisses the *Trans-Pacific Freight Conference* case, *supra,* in these words:

> "That case merely held that the Commission could not issue cease and desist orders against the implementation of provisions in a conference agreement which had been approved by the Commission and had not thereafter been found to be unlawful."

This should be compared with the Commission's explanation of that case in its 1962 Annual Report, p. 19:*

> *"Trans-Pacific Freight Conf. of Japan, et al.* v. *F. M. C. and U. S. A.,* 302 F. 2d 875 (D. C. Cir.) in which it was held that the Commission lacks the power to issue an interim cease and desist order to maintain the status quo pending its finding and decision on a controversy before it."

The Commission then seizes on a footnote in that opinion which states:

> "In *Pacific Coast European Conference—Payment of Brokerage,* 5 F. M. B. 65 (1956), the Board asserted the authority to issue a cease and desist order prohibiting the parties from carrying out an unapproved agreement. We need not express a view as to whether such an order is within the Board's authority. But we note that different considerations might well be involved in such a case. Cf. *Isbrandtsen Co.* v. *U. S.,* 211 F. 2d at 57 (Board not allowed to let dual-rate contract go into effect prior to approval). At 879, footnote 8." (JA 15)

The case to which the footnote refers is a very different one from this case, because, although the Commission said it was deciding the matter on oral argument as a matter of law, it actually held hearings before an Examiner from

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* See also *Alcoa S. S. Company* v. *F. M. C.,* 120 U. S. App. D. C. , 348 F. 2d 756, 758, n 5 (1965); *Arrow Transp. Co.* v. *Southern R. Co.,* 372 U. S. 658, 672, n. 24 (1963).

January 25, to February 3, 1955 and accepted "affidavits of fact," 4 F. M. B. 699. Here, however, the Commission specifically limited the proceeding to memoranda of law.

The Commission goes on to say:

> "That the power of this Commission to issue cease and desist orders preventing the carrying out of unapproved agreements is a necessary corollary to the requirement that such agreements obtain approval before they may be carried out has been recognized by the Courts.[15] [Footnote 15] See e.g., *Trans-Pacific Frgt. Conf. of Japan* v. *Federal Maritime Com'n.*, 314 F. 2d 928, 935-936 (9th Cir. 1963) upholding the Commission's issuance of a cease and desist order against the carrying out of neutral body system without prior Commission approval." (J.A 16)

The Commission has again relied on a case where there was a hearing before an Examiner and a full proceeding before the Commission, 314 F. 2d at 932. Moreover, the Court said in that case:

> "The question always is whether the determination of the board or commission has *'warrant in the record'* and a reasonable basis in law." (Emphasis added) 314 F. 2d at 935.

Finally the Commission relies on *American Export & Isbrandtsen Line* v. *F. M. C.*, 334 F. 2d 185 (9th Cir. 1964). Here again, the Commission relies on a case where it would have considered the facts before issuing its order, for it allowed affidavits of fact to be submitted, and petitioners "did not avail themselves of that opportunity to call to the attention of the Commission any fact which they disputed * * *" and thus waived their right to a full evidentiary hearing. In this case, the Conference has raised such facts.

The Commission rejects these arguments in these words:

> "Respondents attempt to distinguish the order used in the instant case from that used in the *Pacific Coast* case on the ground that the order which forms

> the basis of this case did not provide for the submission of affidavits of fact. This is a distinction without a difference. The 'order to show cause' in this proceeding recited that '[t]he issues raised herein do not involve any disputed issues of fact requiring an evidentiary hearing. . . .' Respondents have set forth the material facts on pages 2 and 3 of their reply to the order to show cause. These facts are not in dispute and have been, as noted above, incorporated verbatim into this report. * * * Respondents do request a full evidentiary hearing 'to develop the facts relating to whether the two-level rate structure at issue here is employed now, or was recently employed in the foreign commerce of the United States, as well as other facts bearing on the allegedly anti-competitive nature of these tariff revisions and their effect on the foreign commerce of the United States.' Such additional facts bearing on the operation or probable operation of a two-level rate system may well be important in a proceeding to determine the approvability of the system. They are, however, irrelevant in the resolution of the only issue involved in this proceeding—the legal question of whether or not the two-level rate system is authorized by approved Agreement 7700" (JA 12).

The "legal question" involved here, is very much a matter of fact, as petitioner pointed out in its memorandum of law and on oral argument. As will be seen, the Commission relies, in answering the question, on cases which deal with a "new scheme," "a new course of conduct," and "a new means of regulating competition" (JA 13). The Conference can show, given an evidentiary hearing, that there is nothing new or startling about the rates it has set. Consequently, such facts are a necessary part of any proper "legal" determination of this question. Similarly, it will be seen that the fact that an agreement is not anti-competitive in nature must be considered in deciding the § 15 issue.

There is no doubt that the Commission knows how to proceed properly in such a case as this. In its Order To

Show Cause in F. M. C. Docket No. 66-52, *In the Matter Of The Petition Of New York Freight Bureau (Hong Kong) For A Declaratory Order,* served October 4, 1966, the Commission recognized the requirements imposed on it by a statutory direction that orders "shall be made only after full hearing." Referring to the similar requirement of Section 15 itself, the Commission prescribed the following procedure in that case:

> "Under section 15, we are empowered 'by order, after notice and hearing.' to modify or disapprove any agreement found to be in violation of the Act.
>
> "Accordingly, the members of the New York Freight Bureau (Hong Kong) are hereby notified, pursuant to our authority under section 15 of the Shipping Act, 1916, that we intend to modify Agreement 5700-4 by deleting subparagraphs 10(b), 10(c), 10(d), and 10(e) and by adding new paragraphs 12 through 16, as set forth in the Appendix A hereto.
>
> "We see no need for the taking of evidence in this proceeding since no genuine issues of material fact are presented. The modifications to Agreement No. 5700-4, which the Commission proposes to make as specified in this notice, have twice been considered and 'approved' by the Commission as satisfying the requirements of section 15 and General Orders 7 and 9. Should any of the parties to this proceeding consider that there are disputed issues of fact which are relevant to this proceeding, such facts shall be specified with particularity by means of affidavits setting forth such facts, together with a statement of their relevance to the issue in question. Should any other parties dispute these facts by a similar affidavit, the disputed issues of fact, if relevant, will be set down for an evidentiary hearing."

No such procedure was followed in the present case where the conference was not allowed to submit affidavits of any kind. The procedure followed by the Commission in the present case is clearly improper (see *Far East Conference* v. *F. M. C.*, No. 19,790, decided September 2, 1966).

The Supreme Court has described the importance of facts to legal determinations of the Commission in *F. M. C. v. Isbrandtsen, Inc., et al.*, 356 U. S. 481, 498 (1958), where it said:

> "... in certain kinds of litigation practical considerations dictate a division of functions between court and agency under which the latter makes a preliminary, comprehensive investigation of all the facts, analyzes them, and applies to them the statutory scheme as it is construed. Compare *Denver Union Stock Yard Co. v. Producers Livestock Marketing Assn., ante*, p. 282. It is recognized that the courts, while retaining the final authority to expound the statute, should avail themselves of the aid implicit in the agency's superiority in gathering the relevant facts and in marshaling them into a meaningful pattern. *Cases are not decided, nor the law appropriately understood, apart from an informed and particularized insight into the factual circumstances of the controversy under litigation*" (Emphasis added).

It has been seen that the Commission was without power to issue an order that rates be stricken from a tariff and that the Conference is to cease and desist from using them without holding a full evidentiary hearing, and that the Commission's arguments to the contrary are not valid.

II.

The Commission's § 15 determination was in error.

In any event, even if the Commission had such power, the rates in question here do not constitute an unfiled agreement under Section 15 and are fully authorized by the Conference's Section 15 agreement.

Section 15 provides, in part:

> "Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be

> lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; *except that tariff rates, fares, and charges, and classifications, rules and regulations explanatory thereof * * * agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval* upon compliance with the publication and filing requirements of section 18(b) hereof and with the provisions of any regulations the Commission may adopt" (Emphasis supplied).

Clearly, the italics words are intended on their face to prevent the result reached by the Commission in this case.

The Commission's attempt to warp this obvious meaning by a reference to legislative history is inaccurate, to say the least. It is said:

> "As the *House Merchant Marine and Fisheries Committee* stated in reporting on what eventually became Public Law 87-346: '[W]e construe the purpose of this provision to be that individual rate changes by the Conference need not be approved . . . The difficulty stems from the fact that in many instances conferences may insert rules and regulations in their tariffs which have the effect of restricting competition in a manner *not reasonably to be inferred from the basic agreement.*[14] [Footnote 14] H. Rept. 498, 87th Cong., p. 19. Because of this 'difficulty', the *Committee suggested* striking of the words 'tariffs of' preceding 'rates, fares, and charges.' As enacted, in accordance with this recommendation, the provision reads simply 'tariff rates, fares, and charges. . . .' " (Emphasis added) (JA 15).

Reference to the cited page will show the quoted language comes from comments of the Secretary of Commerce/Federal Maritime Board letter appended to the House Report as a routine departmental report!

This citation is, therefore, most extraordinary.

The change in language from "tariffs of" to "tariff" rates, etc. obviously does not change the meaning of the statute in this context. A mere rate action is not intended to come within the meaning of Section 15.

The Commission (JA 13), then makes an analogy to cases which have been reviewed by Courts holding that separate Section 15 approval is required of dual rate contracts and a rule prohibiting brokerage payments, *Isbrandtsen Co.* v. *U. S.*, 93 U. S. App. D. C. 293, 211 F. 2d 51 (D. C. Cir. 1954), *American Union Transport* v. *U. S.*, 103 U. S. App. D. C. 229, 257 F. 2d 607 (D. C. Cir. 1958).

Both these cases were decided *prior* to the insertion of the above language in Section 15. Moreover, even before this amendment, the Commission and the courts held that the modification of tariffs does not require section 15 approval, *Empire State H'way Ass'n.* v. *American Export Lines*, 5 F. M. B. 565 (1959), affirmed, *Empire State H'way Ass'n.* v. *F. M. B.*, 110 U. S. App. D. C. 208, 291 F. 2d 336 (1961).

The Commission also relies on a case finding that a port equalization rule requires separate Section 15 approval. *American Export & Isbrandtsen L.* v. *F. M. C.*, supra. Clearly, such a system is not the same as the conference's tariff revisions which merely changed the rates set on its usual commodities. Finally, the Commission relies on its own decision in *Joint Agreement-Far East Conference and Pac. W. B. Conf.*, 8 F. M. C. 553 (1965) for the proposition that a separate approval must be obtained for "activity the nature and manner of effectuation of which cannot be ascertained by a mere reading of the basic agreement." Such a proposition is nothing but an archaic application of the concept that words have a "plain meaning" extrinsic of the facts surrounding them. This concept has no foundation in modern law.

In any event, the Conference, in its approved agreement, is authorized to set rates by Article 1 which states:

> "This agreement covers the establishment and maintenance of agreed rates, charges and practices for or

> in connection with transportation of cargo by members of this Conference."

That this language is intended to authorize the setting of rates would seem without doubt, but the Conference has indicated that it could show that the fact situation surrounding such rates and the trade make it clear that this is the meaning of this provision, if it were given an evidentiary hearing. Moreover, such a hearing would show that the rates set by the Conference do not constitute a "new scheme", "a new course of conduct", or "a new means of regulating competition" within the meaning of the cases cited by the Commission (JA 13) that held novel actions by Conferences not to be covered by their approved section 15 agreements.

Furthermore, section 15 is intended to cover only anti-competitive agreements, *Volkswagenwerk A. G.* v. *Marine Terminals Corp.*, 6 SRR 685, 690 (1965). The Commission has also stated:

> "Section 15 is concerned with competitive relationships and the limited lessening of competition in the furtherance of our maritime transportation policy. Thus, to determine if an agreement falls within the requirements of section 15, we must consider in the interest of uniform, enlightened regulation to what extent the agreements affect competition." *Agreement No. T-4; Term. Lease Agree., Long Beach, Calif.*, 8 F. M. C. 521, 529 (1965).

It is clear that even if the Commission were correct in holding that the rates set by the Conference constitute a separate agreement not covered by the Conference's approved section 15 agreement, the rates are designed to make the Conference more competitive with the foreign-flag rate making group in the trade and are definitely not anti-competitive in nature and thus not subject to section 15.

Also important to such a determination is the fact that almost all conferences offer "project rates," lower rates, different than their tariff rates, for cargo destined for

large industrial developments. The Commission rejects this point in Note 11 (JA 14), by saying that it has never said that this almost universal practice is legal under Section 15. It also, of course, has neglected to say—if this comment is accepted—that these rates are not legal, despite the fact that it has had an Examiner's report, cited in the note, before it reporting fully on the matter, for more than a year.

The Examiner, moreover, pointed to clauses similar to Article 1 in this agreement as the basis for setting such rates. *Fact Finding Investigation No. 8*, 6 S. R. R. 535, 544 (May 28, 1965).

It is unrealistic for the Commission to say that this report, which has been in its hands for more than a year, can be given no weight at all.

It has thus been seen that even if the Commission had the authority to issue the order at issue here without an evidentiary hearing—which it does not—the Commission's decision that the rates set by the Conference constitute an unfiled section 15 agreement is an erroneous reading of the law.

Summary

It has been seen that the Commission in its Order To Show Cause specifically limited this proceeding to the submission of memoranda of law and oral argument thereon. No opportunity was given petitioner to establish the relevant facts which it was necessary to take into consideration in order to make a proper determination as to whether or not the rates instituted by the petitioner were in violation of § 15 of the Shipping Act, 1916, as amended. Under these circumstances, the Commission was without authority to issue a cease and desist order without a full evidentiary hearing.

The Commission's decision on the § 15 issue, reached pursuant to this improper procedure, was in error.

In the first place, § 15 of the Shipping Act, as amended in 1961, specifically states that tariff rates, fares and charges agreed upon by approved conferences shall be permitted to take effect without prior approval and the Commission's attempt to avoid this clear statutory language by reference to the legislative history is completely ineffective in that the portion of the legislative history cited is not a quotation from the House Committee on Merchant Marine and Fisheries, as the Commission Report states, but rather is from a letter to the committee from the Commission's predecessor, the Federal Maritime Board, and Congress took no action as a result of that letter which is relevant here.

In the second place, the rates set by the Conference were set pursuant to its approved agreement. The cases cited by the Commission's Report are not controlling or applicable to this situation. If there were any doubt in this regard it would have been cleared up if the Conference had been allowed to show the practices of this and surrounding trades and thus demonstrate that the rates were not new or unusual but were rather a well understood method of rate-making in the trade.

Moreover, even if the rates were said to be not covered by the Conference's approved section 15 agreement they are designed to increase competition with the foreign-flag rate making group in the trade and thus are not the sort of anti-competitive actions covered by section 15.

The Commission's decision therefore should not be allowed to stand.

Conclusion

For the foregoing reasons, petitioner prays that this Court:

1. Hold that the Commission report and final order of July 22, 1966 was without basis in law and contrary to Section 15 of the Shipping Act, 1916, as amended;

2. Vacate the Commission's decision and remand the decision to the Commission with instructions to hold a full evidentiary hearing in this proceeding before making a determination pursuant to Sections 15 and 22 of the Shipping Act, 1916.

3. Grant such other and further relief as the Court may deem appropriate.

Respectfully submitted,

ELMER C. MADDY,
RONALD A. CAPONE,
BALDVIN EINARSON,
120 Broadway,
New York, N. Y. 10005.

and

The Farragut Building,
900 Seventeenth St., N. W.,
Washington 6, D. C.

October 19, 1966.

KIRLIN, CAMPBELL & KEATING,
120 Broadway,
New York, N. Y. 10005.

and

The Farragut Building,
900 Seventeenth St., N. W.,
Washington 6, D. C.
of Counsel.

ADDENDUM

70349

December 10, 1965

Mr. William Levenstein, Chief
Division of Carrier Agreements
Office of Foreign Regulation
Bureau of Compliance
Federal Maritime Commission
Washington, D. C. 20573

Re: A17-9-1/7700-9:32

Dear Mr. Levenstein:

We wish to refer to your letter of November 26, 1965 in which you ask for a comprehensive explanation of the following sentence from proposed Agreement No. 7700-9.

> "Nothing in the Agremeent shall prevent the parties to this Agreement from acting as agents for other common carriers in the trade."

The intent of the parties is to insure that nothing in Agreement No. 7700 will prevent the parties from acting as steamship agents or general steamship agents for other common carriers in the trade.

As you no doubt realize, the approval of the quoted language would not constitute approval under Section 15 of the agency arrangements which may be entered into. It merely insures that Agreement No. 7700 will not be an obstacle to such arrangements. If a party were to agree to act as a steamship agent for another carrier in the trade, any such agreement which fell within the purview of Section 15 would, of course, have to be filed with the Commission.

Yours very truly,

KIRLIN, CAMPBELL & KEATING

By:

BALDVIN EINARSON

BE/bm

FEDERAL MARITIME COMMISSION
Washington, D. C. 20573

Jan 17 1966

In reply refer to:
A17-9-1/7700-9:32

Mr. Elmer C. Maddy
Kirlin, Campbell & Keating
120 Broadway
New York, New York 10005

Dear Mr. Maddy:

During our conversation on Friday, January 7, 1966, we expressed the belief that the protest filed by the "8900 Lines" against approval of Agreement 7700-9 would most likely be withdrawn if certain additional language were made part of that agreement. Specifically, we suggested the inclusion of the following new sentence at the end of Article 4, as amended:

> "No such agency arrangements may be implemented prior to approval by the Federal Maritime Commission."

We have not received any further word from you pertaining to the above matter. If the parties to Agreement 7700-9 are agreeable to our suggestion, we would appreciate their early attention to the filing with the Commission of a revised agreement including the above-quoted wording.

Sincerely yours,

/s/ William Levenstein
WILLIAM LEVENSTEIN, Chief
Division of Carrier Agreements
Office of Foreign Regulation
Bureau of Compliance

FEDERAL MARITIME COMMISSION
Washington, D. C. 20573

Feb 28 1966

In reply refer to:
A17-9-1/7700-9:32

Mr. Elmer C. Maddy
Kirlin, Campbell & Keating
One Twenty Broadway
New York, New York 10005

Dear Mr. Maddy:

In our letter of January 17, 1966, copy enclosed, we expressed the belief that the protest filed by the "8900 Lines" against approval of Agreement 7700-9 would most likely be withdrawn if certain additional language which we suggested in our letter were made a part of that agreement.

We have not received any word from you pertaining to the above matter. Further processing of Agreement 7700-9 is being held in abeyance pending advice from you as to the position of the parties to the agreement on the matter referred to.

Your early reply will be greatly appreciated.

Sincerely yours,

/s/ William Levenstein
WILLIAM LEVENSTEIN, Chief
Division of Carrier Agreements
Office of Foreign Regulation
Bureau of Compliance

Enclosure

APPENDIX

RELEVANT PORTIONS OF STATUTES* INVOLVED

A. Shipping Act of September 7, 1916, c. 451, 39 Stat. 728, as amended, 46, U. S. C. A. 801-842.

SECTION 15, 39 Stat. 733, as amended, 46 U. S. C. A. 814

Every common carrier by water, or other person subject to this chapter shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and

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* Statutes below are quoted from U. S. C. A.

shall approve all other agreements, modifications or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto. If otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing require-

ments of section 817(b) of this title and with the provision of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of section 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 813a of this title shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action: *Provided however,* That the penalty provisions of this section shall not apply to leases, licenses, assignments, or other agreements of similar character for the use of terminal property or facilities which were entered into before the date of enactment of this Act, and, if continued in effect beyond said date, submitted to the Federal Maritime Commission for approval prior to or within ninety days after the enactment of this Act, unless such leases, licenses, assignments, or other agreements for the use of terminal facilities are disapproved, modified, or canceled by the Commission and are continued in operation without regard to the Commission's action thereon. The Commission shall promptly approve, disapprove, cancel, or modify each such agreement in accordance with the provisions of this section. As amended Oct. 3, 1961, Pub. L. 87-346, § 2, 75 Stat. 763; Feb. 29, 1964, Pub. L. 88-275, 78 Stat. 148.

SECTION 22, 39 Stat. 736, as amended, 46 U. S. C. A. § 821.

COMPLAINTS TO BOARD AND INVESTIGATIONS

Any person may file with the Federal Maritime Board a sworn complaint setting forth any violation of this chapter by a common carrier by water, or other person subject to this chapter, and asking reparation for the injury, if any, caused thereby. The Board shall furnish a copy of the

complaint to such carrier or other person, who shall, within a reasonable time specified by the Board, satisfy the complaint or answer it in writing. If the complaint is not satisfied the Board shall, except as otherwise provided in this chapter, investigate it in such manner and by such means, and make such order as it deems proper. The Board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The Board, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this chapter.

SECTION 23, 39 Stat. 736, as amended, 46 U. S. C. A. § 822.

ORDERS OF BOARD MADE ONLY AFTER FULL HEARING

Orders of the Federal Maritime Board relating to any violation of this chapter shall be made only after full hearing, and upon a sworn complaint or in proceedings instituted of its own motion.

All orders of the Federal Maritime Board, other than for the payment of money, made under this chapter, as amended or supplemented, shall continue in force until its further order, or for a specified period of time, as shall be prescribed in the order, unless the same shall be suspended, or modified, or set aside by the Board, or be suspended or set aside by a court of competent jurisdiction.

B. Review Act of December 29, 1950, c. 1189, 64 Stat. 1129-1132, as amended, 5 U. S. C. A. 1031-1042.

SECTION 2, 64 Stat. 1129, as amended, 5 U. S. C. A. 1032.

JURISDICTION OF COURTS OF APPEALS

The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to

determine the validity of, all final orders (a) of the Federal Communications Commission made reviewable in accordance with the provisions of section 402(a) of Title 47, and (b) of the Secretary of Agriculture made under the Packers and Stockyards Act, 1921, as amended, and under the Perishable Agricultural Commodities Act, 1930, as amended, except orders issued under section 210(e), 217a and 499g(a) of Title 7, and (c) such final orders of the United States Maritime Commission or the Federal Maritime Board or the Maritime Administration entered under authority of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended, as are now subject to judicial review pursuant to the provisions of section 830 of Title 46 and (b) of the Atomic Energy Commission made reviewable by section 2239 of Title 42.

Such jurisdiction shall be worked by the filing of a petition as provided in section 1034 of this title.

SECTION 3, 64 Stat. 1130, 5 U. S. C. A. 1033.

VENUE

The venue of any proceeding under this chapter shall be in the judicial circuit wherein is the residence of the party or any of the parties filing the petition for review, or wherein such party or any of such parties has its principal office, or in the United States Court of Appeals for the District of Columbia.

SECTION 4, 64 Stat. 1130, 5 U. S. C. A. 1034.

REVIEW OF ORDERS; TIME; NOTICE; CONTENTS OF PETITION; SERVICE

Any party aggrieved by a final order reviewable under this chapter may within sixty days after entry of such order, file in the court of appeals wherein the venue as prescribed by section 1033 of this title lies, a petition to review such order. Upon the entry of such an order, notice thereof shall be given promptly by the agency by service or publica-

tion in accordance with the rules of such agency. The action in court shall be brought against the United States. The petition shall contain a concise statement of (a) the nature of the proceedings as to which review is sought, (b) the facts upon which venue is based, (c) the grounds on which relief is sought, and (d) the relief prayed. The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition upon the Attorney General of the United States by mailing by registered mail, with request for return receipt, a true copy to the agency and a true copy to the Attorney General.

Section 9(a), 64 Stat. 1131, 5 U. S. C. A. 1039(a).

Jurisdiction of Proceeding—Exclusive

Upon the filing and service of a petition to review, the court of appeals shall have jurisdiction of the proceeding. The court of appeals in which the record on review is filed, on such filing, shall have jurisdiction to vacate stay orders or interlocutory injunctions therefore granted by any court, and shall have exclusive jurisdiction to make and enter, upon the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.

C. Administrative Procedure Act of June 11 1946, c. 324, 60 Stat. 237, 5 U. S. C. A. 1001-1011.

Section 5, 60 Stat. 239, 5 U. S. C. A. 1004.

Adjudications

In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts

de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 1010 of this title; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives.

NOTICE OF HEARING AND ISSUES

(a) Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jursidiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

PROCEDURE

(b) The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals or adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 1006 and 1007 of this title.

AUTHORITY AND FUNCTIONS OF OFFICERS AND EMPLOYEES

(c) The same officers who preside at the reception of evidence pursuant to section 1006 of this title shall make

the recommended decision or initial decision required by section 1007 of this title except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 1007 of this title except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

DECLARATORY ORDERS

(d) The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

SECTION 7, 60 Stat. 241, 5 U. S. C. A. 1006.

HEARINGS; PRESIDING OFFICERS; POWERS AND DUTIES; BURDEN OF PROOF; EVIDENCE; RECORD AS BASIS FOR DECISION

In hearings which section 1003 or 1004 of this title requires to be conducted pursuant to this section—

(a) There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which

comprises the agency, or (3) one or more examiners appointed as provided in this chapter; but nothing in this chapter shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 1007 of this title shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 1007 of this title, and (9) take any other action authorized by agency rule consistent with this chapter.

(c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported

by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 1007 of this title and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

INDEX TO JOINT APPENDIX

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

DOCKET NO. 20,350

PERSIAN GULF OUTWARD FREIGHT CONFERENCE,
Petitioner,

v.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

Petition for Review

This is a petition to review a final order of the Federal Maritime Commission (hereinafter referred to as the "Commission"), entered under the Shipping Act, 1916, 46 U.S.C. 801, et seq., and served on July 22, 1966 in *The Persian Gulf Outward Freight Conference (Agreement 7700)—Establishment of a Rate Structure Providing for Higher Rate Levels for Service via American-Flag Vessels versus Foreign-Flag Vessels* in F.M.C. Docket No. 66-27. A copy of the Commission order and accompanying report is attached hereto marked Exhibit A.

JURISDICTION AND VENUE

This Court has jurisdiction to review orders of the Commission pursuant to 5 U.S.C. Sec. 1032. Venue is in this Court under 5 U.S.C. Sec. 1033.

[2] NATURE OF PROCEEDINGS AS TO WHICH REVIEW IS SOUGHT:

By order of Federal Maritime Commission dated April 19, 1966, the Persian Gulf Outward Freight Conference was ordered to show cause why the tariff revisions filed with the Commission on March 10, 1966, effective March 11, 1966, instituting a two-level rate structure based upon vessels registry should not be declared unlawful and why rates should not be ordered to be stricken from the tariff.

The Commission, in its Order to Show Cause, specifically stated that:

> "This proceeding shall be limited to the submission of memoranda of law . . ."

The Conference submitted a memorandum of law, but protested that the Commission was not authorized to take action in this matter until it had held a full evidentiary hearing, under Sections 15, 22 and 23 of the Shipping Act, 1916, as amended, 46 U.S.C. §§ 814, 821 and 822, Sections 5 and 7 of the Administrative Procedure Act, 5 U.S.C. §§ 1004, 1006, and the Commission's own Rules of Practice and Procedure, 46 C.F.R. § 502.142. A memorandum of law in reply was filed by the Commission's Hearing Counsel, and the Commission heard oral argument on June 22, 1966.

[3] By a Report and Order of July 22, 1966, of which review is sought herein, the Commission found that the rate structure contained in the Conference's challenged tariff was not authorized by the Conference's agreement, F.M.C. Agreement No. 7700, as amended, and ordered the Conference to cease and desist from carrying cargo at such rates prior to approval of the rate structure under Section 15 of the Shipping Act, 1916; and further ordered the rates in question stricken from the Conference's tariff.

Petition for Review

By Agreement No. 7700, approved May 28, 1946, the basic conference agreement of the Persian Gulf Outward Freight Conference, the two members of the Conference, Isthmian Lines, Inc. and Central Gulf Lines, derive their authority to act and function as a conference in the trade from the U.S. Atlantic and Gulf ports to ports in the Persian Gulf and adjacent waters in the range west of Karachi and northeast of Aden (but excluding Aden and Karachi).

On March 10, 1966, the Conference filed with the Commission revisions of its Freight Tariff No. 8, F.M.C. No. 1, effective March 11, 1966, affecting the rates on certain specified commodities. The revisions establish for each of the commodities concerned one rate if shipped via U.S. flag vessel, and another

[4] lower rate if shipped via foreign-flag vessel. No commodities have been added or removed from the Tariff, no rates have been increased, and there is no requirement that any shipper be signatory to any contract in order to avail itself of the revised rates.

Article 1 of Agreement No. 7700, the Conference Agreement, provides that:

> "This agreement covers the establishment and maintenance of agreed rates, charges and practices for or in connection with transportation of cargo by members of this Conference."

It is the Conference's position that this article of the Conference Agreement plainly authorizes the Conference to set the rates questioned by the Commission.

The Report and Order of the Commission is a final order within the meaning of 5 U.S.C. §§ 1009(e) and 1032.

Petitioner is aggrieved and petitions this Court for review of the Commission's order.

Petition for Review

GROUNDS ON WHICH RELIEF IS SOUGHT

The Commission by this report and final order has committed the following errors of law:

[5] 1) The Commission has no authority to issue a Cease and Desist Order in such a case without a full evidentiary hearing, under Sections 15, 22 and 23 of the Shipping Act, 1916, as amended, 46 U.S.C. §§ 814, 821 and 822, Sections 5 and 7 of the Administrative Procedure Act, 5 U.S.C. §§ 1004, 1006, and the Commission's own Rules of Practice and Procedure, 46 C.F.R. § 502.142.

2) The Commission's decision was contrary to Section 15 of the Shipping Act, 1916, in that it found that the Conference's rate structure was unauthorized by the Conference's approved agreement as a matter of law.

THE RELIEF PRAYED

Petitioner prays that this Court:

1. Hold that the Commission report and final order of July 22, 1966 was without basis in law and contrary to Section 15 of the Shipping Act, 1916, as amended;

2. Vacate the Commission's decision and remand the decision to the Commission with instructions to hold a full evidentiary hearing in this proceeding before making a determination pursuant to Sections 15 and 22 of the Shipping Act, 1916.

3. Grant such other and further relief as the Court may deem appropriate.

[6] Respectfully submitted,

Elmer C. Maddy
ELMER C. MADDY

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and

The Farragut Building,
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July 26, 1966.

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of Counsel.

[Appendix A to Petition for Review]

Report

SERVED
JULY 22, 1966
FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

Docket No. 66-27

THE PERSIAN GULF OUTWARD FREIGHT CONFERENCE (AGREEMENT 7700) — ESTABLISHMENT OF A RATE STRUCTURE PROVIDING FOR HIGHER RATE LEVELS FOR SERVICE VIA AMERICAN-FLAG VESSELS VERSUS FOREIGN-FLAG VESSELS

Two-level rate structure based upon vessel flag not authorized by basic conference agreement (Agreement 7700). Two-level rates stricken from conference tariff and carriage under such rates forbidden prior to approval under section 15, Shipping Act, 1916, of two-level rate structure.

ELMER C. MADDY and WILLIAM PETER KOSMAS for respondents, Persian Gulf Outward Freight Conference and its member lines, Central Gulf Steamship Corporation and Isthmian Lines, Inc.

DONALD J. BRUNNER and NORMAN D. KLINE, Hearing Counsel.

BY THE COMMISSION (John Harllee, Chairman; John S. Patterson, Vice Chairman; George H. Hearn, Commissioner.)*

* Commissioners Ashton C. Barrett and James V. Day did not participate.

Report

The Commission instituted the subject proceeding by order served April 19, 1966, requiring the Persian Gulf Outward Freight Conference (Agreement 7700) (the Conference) and its member lines to show cause why their two-level rate structure based upon vessel registry should not be declared unlawful and such two-level rates ordered stricken from the Conference's tariff.

STATEMENT OF FACTS

By Agreement No. 7700, approved May 28, 1946, the basic conference agreement of the Persian Gulf Outward Freight Conference, the two members of the Conference, Isthmian Lines, Inc. and Central Gulf Lines, both American flagship lines, derive their authority to act and function as a conference in the trade from the U.S. Atlantic and Gulf ports to ports in the Persian Gulf and adjacent waters in the range west of Karachi and northeast of Aden (but excluding Aden and Karachi).

[23] On March 10, 1966, the Conference filed with the Commission revisions to its Freight Tariff No. 8, F.M.C. No. 1, effective March 11, 1966, affecting the rates on certain specified commodities. The revisions establish for each of the commodities concerned one rate if shipped via U.S.-Flag vessel, and another lower rate if shipped via foreign-flag vessel. No commodities have been added or removed from the Tariff, no rates have been increased, and there is no requirement that any shipper be signatory to any contract in order to avail itself of the revised rates. As indicated in the Commission's Order, the tariff revisions are not an implementation of the Conference's approved dual rate system.[1]

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[1] This paragraph and the one preceding it have been taken *verbatim* from respondents' Reply to Order To Show Cause, 2-3, and constitute the entire section captioned *Statement of Facts*.

Report

Article 1 of Agreement 7700, which the Conference alleges is the authority for establishing the two-level rate system, provides that:

> This agreement covers the establishment and maintenance of agreed rates, charges and practices for or in connection with transportation of cargo by members of this Conference.[2]

The show cause order stated the legal basis for the institution of this proceeding as follows:

> It appears that the above-quoted language of Agreement No. 7700 [Article 1] does not encompass the authority to establish a two-level rate structure which provides for higher rates on cargo transported in American-Flag vessels than for cargo transported in Foreign-Flag vessels and that the establishment of such rates introduces an entire new scheme of ratemaking and discrimination not embodied in the basic agreement requiring specific approval pursuant to section 15 of the Shipping Act, 1916.
>
> The conference has not submitted to the Commission a request for the modification of its organic agreement to specifically set forth therein the authority required to establish and maintain the two-level rate structure at issue pursuant to section 15, Shipping Act, 1916, which rate structure is being effectuated by the member lines.

[3] Section 15 provides in part that:

> "Any agreement and any modification or cancellation of any agreement not approved, or disapproved,

[2] See respondents' Reply to Order To Show Cause, 13-14.

> by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; . . ."
>
> It, therefore, appears that the publication and effectuation of the two-level rate structure herein at issue by the member lines of the Persian Gulf Outward Freight Conference may constitute the carrying out of an unfiled, unapproved agreement in violation of the terms of section 15.

A memorandum of law captioned "Reply to Order to Show Cause" was filed by respondents, and a reply to this "Reply" was filed by Hearing Counsel.[3] We have heard oral argument.

Positions of the Parties

A.) The Conference maintains that the show cause form of investigation in this proceeding is unauthorized by the Shipping Act, the Administrative Procedure Act, and the Commission's own Rules of Practice and Procedure and that, even if authorized, it could not terminate in a determination of the unlawfulness of the two-level rate structure, because such structure is authorized by the present terms of Conference Agreement 7700. More specifically, the Conference alleges:

1.) The Commission is empowered to issue cease and desist orders, but only upon findings pursuant to full evi-

[3] The Commerce and Industry Association of New York, Inc., intervened but did not otherwise participate in the proceeding.

dentiary hearing. The use of the show cause order in this proceeding is an attempt to declare the system hereunder investigation unlawful and prohibit its use without providing the required opportunity for hearing and is an unjustified attempt to place the burden of proving the legality of the system upon respondents.

2.) Even if the proceeding were properly instituted, the two-level rate system is authorized by the basic Conference agreement and cannot here be declared unlawful. The two-level rate system is a "routine" rate change which does not require Commission approval prior to its effective date.

[4] It is similar to a system of project rates which does not require separate Commission approval where the basic Conference agreement has a provision like that for rate establishment in Agreement 7700. The two-level rate system is necessitated because without it the Conference is unable to compete successfully with the 8900 Group (another conference in the same trade operating foreign flag vessels exclusively) for the carriage of commercial cargo.

B.) Hearing Counsel maintain that the show cause form of investigation is justified in this proceeding because the issues raised do not involve any disputed questions of fact, and the subject rate structure is not a routine arrangement and therefore requires additional Commission approval before it may be instituted. More specifically, they allege:

1.) The show cause proceeding has repeatedly been used by the Commission where, as here, the questions to be resolved involved only issues of law and there was no dispute as to material questions of fact. The use of a show cause order has, moreover, recently been upheld by the

Court of Appeals for the 9th Circuit in a case similar to the instant one in which the Court affirmed the Commission's determination in a show cause proceeding that a port equalization system was unauthorized by general rate-making provisions in a basic conference agreement. Although the Commission is not empowered to issue cease and desist orders prohibiting the parties from carrying out an approved agreement prior to findings of violations, there is no authority for the proposition that the Commission may not issue such orders prohibiting the carrying out of unapproved agreements, and the Commission has been forbidden to allow dual rate contracts to go into effect prior to approval.

2.) The two-level rate system established by respondents is no more "routine" than port equalization systems, dual rate contracts, and agreements to prohibit brokerage, all of which the Commission has required to be filed for separate approval under section 15. It may well be that [5] trade factors are such that the system should be granted approval. However, approval of the system is not the question here. An agreement like the one in question cannot be instituted prior to approval, and such approval would require full evidentiary hearing on the merits, especially since the two-level rate system appears to be discriminatory with reference to Government cargoes which must under cargo preference laws move on American flag vessels.

Discussion and Conclusions

The use by the Commission of an order to show cause to resolve the legal question of whether or not a certain type of arrangement is authorized by the wording of an approved conference agreement has been recognized as proper by the courts. *Pacific Coast Port Equalization Rule,*

7 F.M.C. 623 (1963), *aff'd sub nom. American Export & Isbrandtsen L. v. Federal Maritime Com'n*, 334 F.2d 185 (9th Cir. 1964).[4]

[6] It is clear from a reading of section 1 of Agreement 7700 and a review of the applicable case law that the two-level rate system here involved is one which cannot be effectuated prior to separate section 15 approval. Separate section 15 approval has been required by the Commission and its predecessors of arrangements (1) introducing an entirely new scheme of rate combination and discrimination not embodied in the basic agreement (the

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[4] Respondents attempt to distinguish the order used in the instant case from that used in the *Pacific Coast* case on the ground that the order which forms the basis of this case did not provide for the submission of affidavits of fact. This is a distinction without a difference. The "order to show cause" in this proceeding recited that "[t]he issues raised herein do not involve any disputed issues of fact requiring an evidentiary hearing. . . ." Respondents have set forth the material facts on pages 2 and 3 of their reply to the order to show cause. These facts are not in dispute and have been, as noted above, incorporated verbatim into this report. Respondents' contention that the show cause order in this proceeding improperly attempts to shift to them the burden of proof is irrelevant. The doctrine of burden of proof has no application in proceedings in which there are no material facts in dispute. Respondents do request a full evidentiary hearing "to develop the facts relating to whether the two-level rate structure at issue here is employed now, or was recently employed in the foreign commerce of the United States, as well as other facts bearing on the allegedly anti-competitive nature of these tariff revisions and their effect on the foreign commerce of the United States." Such additional facts bearing on the operation or probable operation of a two-level rate system may well be important in a proceeding to determine the approvability of the system. They are, however, irrelevant in the resolution of the only issue involved in this proceeding—the legal question of whether or not the two-level rate system is authorized by approved Agreement 7700.

dual rate contract):[5] (2) representing a new course of conduct (prohibition of brokerage on a particular shipment);[6] (3) providing new means of regulating and controlling competition (port equalization system);[7] (4) not limited to the pure regulation of intraconference competition;[8] or (5) constituting an activity by the nature and manner of effectuation of which cannot be ascertained by a mere reading of the basic agreement.[9]

The effectuation of conduct following under only one of the above criteria would require separate prior section 15 approval. The two-level rate system here involved comes within all five of them. No mention is made in the basic agreement of a system of rates based upon vessel flag; the institution of such new system of rates would, of course, represent a new course of conduct; the conference, moreover, admits that the purpose of the system is "to maximize inter-conference competition in

[7] the trade while at the same time, regulating and minimizing business confusion and intra-conference competition";[10] finally, it cannot be contended that a mere reading of Article 1 of Agreement 7700, the sole provision under which the conference alleges it has authority to institute the system, indicates that the conference is to be empowered to institute any system

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[5] *Isbrandtsen Co.* v. *United States*, 211 F.2d 51, 56 (D.C. Cir. 1954).

[6] *American Union Transport* v. *River Plate & Brasil Confs.*, 5 F.M.B. 216, 221 (1957), *aff'd sub nom. American Union Transport* v. *United States*, 257 F.2d 607, 613 (D.C. Cir. 1958).

[7] *Pacific Coast Port Equalization Rule*, *supra*, at 630.

[8] *Id.*

[9] *Joint Agreement-Far East Conf. and Pac. W.B. Conf.*, 8 F.M.C. 553, 558 (1965).

[10] See Respondents' Reply to Order to Show Cause, 24.

of two-levels of rates for the carriage of the same commodities, much less one based on vessel flag.[11]

We do not mean to imply that "routine operations relating to current rate charges and other day-to-day transactions between the carriers under conference agreements" need separate approval under section 15. See *Ex Parte 4, Section 15 Inquiry*, 1 U.S.S.B. 121, 125 (1927). In fact Congress, in enacting Public Law 87-346 [12] which amended section 15, specifically stated that "tariff rates, fares, and charges, and classifications, rules and regulations explanatory thereof . . . agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval. . . ."

A review of the legislative history of this provision and the cases construing it, however, indicate that "it is intended absent additional approval to limit conference authority, such as that contained in section 1 of respondents' basic agreement, strictly to the rate-making authority

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[11] Respondents' analogy of their two-level rate system to project rate systems is at best not in point. The proceeding cited by respondents for the analogy, *Fact Finding No. 8, May 24, 1965, Report of E. Robert Seaver, Investigating Officer*, does not indicate that project rate systems may lawfully be carried out without special section 15 authority. That proceeding is just what its name implies—a fact finding investigation. It is not adjudicatory in nature. It indicates that some conference agreements do not contain separate authorization for project rate systems. It also indicates that the Commission has approved in a docketed proceeding a conference agreement containing a separate provision authorizing project rates. *In the Matter of Agreement No. 6870*, 3 F.M.B. 227 (1950). Project rate systems have never been held by the Commission or its predecessors not to require specific authorization in a section 15 agreement.

[12] 75 Stat. 762, 764.

therein provided for."[13] As the House Merchant Marine and Fisheries Committee

[8] stated in reporting on what eventually became Public Law 87-346: "[W]e construe the purpose of this provision to be that individual rate changes by Conferences need not be approved. . . . The difficulty stems from the fact that in many instances conferences may insert rules and regulations in their tariffs which have the effect of restricting competition in a manner not reasonably to be inferred from the basic agreement."[14]

We conclude that the two-level rate system based upon vessel flag is unauthorized by Agreement 7700 and cannot be effectuated prior to Commission approval. Should the Conference wish to effectuate this system, it must submit an agreement embodying it for, and receive, our approval.

The Conference's contention that the Commission cannot issue a cease and desist order and require the two-level rates stricken from the Conference's tariff in this proceeding is without merit. *Trans-Pacific Freight Conference of Japan* v. *Federal Maritime Board*, 302 F. 2d 875 (D.C. Cir. 1962), relied upon by respondents for support of this position is inapposite. That case merely held that the Commission could not issue cease and desist orders against the implementation of provisions in a conference agreement which had been approved by the Commission and had not thereafter been found to be unlawful. The Court in that very case stated:

> In *Pacific Coast European Conference—Payment of Brokerage*, 5 F.M.B. 65 (1956), the Board asserted

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[13] *Pacific Coast Port Equalization Rule*, *supra*, at 632.

[14] H. Rept. 498, 87th Cong., p. 19. Because of this "difficulty", the Committee suggested striking of the words "tariffs of" preceding "rates, fares, and charges." As enacted, in accordance with this recommendation, the provision reads simply "tariff rates, fares, and charges. . . ."

> the authority to issue a cease and desist order prohibiting the parties from carrying out an unapproved agreement. We need not express a view as to whether such an order is within the Board's authority. But we note that different considerations might well be involved in such a case. Cf. *Isbrandtsen Co.* v. *U.S.*, 211 F. 2d at 57 [Board not allowed to let dual-rate contract go into effect prior to approval.] At 879, footnote 8.

[9] That the power of this Commission to issue cease and desist orders preventing the carrying out of unapproved agreements is a necessary corollary to the requirement that such agreements obtain approval before they may be carried out has been recognized by the Courts.[15]

The assertion of such power and the requirement by the Commission pursuant to its exercise that authorizing matter be stricken from a tariff have, moreover, specifically been affirmed in a proceeding instituted by an order to show cause. In *American Export & Isbrandtsen L.* v. *Federal Maritime Com'n., supra,* the Commission was upheld by the Court of Appeals for the Ninth Circuit in requiring the respondent conference in a proceeding instituted by order to show cause to cease and desist from effectuating a port equalization system without specific prior approval and to strike the rule implementing that system from its tariff.

Respondents will be required to cease and desist from carrying out the two-level system here at issue until such time as it may be specifically authorized by an agreement approved by the Commission.

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[15] See e.g., *Trans-Pacific Frgt. Conf. of Japan* v. *Federal Maritime Com'n.*, 314 F. 2d 928, 935-936 (9th Cir. 1963) upholding the Commission's issuance of a cease and desist order against the carrying out of modification of neutral body system without prior Commission approval.

Report

The two-level rates contained in the Conference's tariffs are not in accordance with the presently authorized conference agreement. As only those tariff modifications "in accordance with law" may take effect upon filing, these rates cannot be given effect and must be stricken from the Conference tariff until such time as approval may be obtained for the two-level rate system based upon vessel flag.

An appropriate order will be entered.

THOMAS LISI
Thomas Lisi
Secretary

Order

SERVED
JULY 22, 1966
FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

DOCKET No. 66-27

THE PERSIAN GULF OUTWARD FREIGHT CONFERENCE (AGREEMENT 7700)—ESTABLISHMENT OF A RATE STRUCTURE PROVIDING FOR HIGHER RATE LEVELS FOR SERVICE VIA AMERICAN-FLAG VESSELS VERSUS FOREIGN-FLAG VESSELS.

This proceeding having been instituted on order to show cause, the Commission having received memoranda of law and heard oral argument on such order and having pursuant thereto issued on this date a report in this proceeding, which is hereby referred to and incorporated herein by reference,

THEREFORE, IT IS ORDERED THAT,

(1) Respondents Persian Gulf Outward Freight Conference and its member lines, Central Gulf Steamship Corporation and Isthmian Lines, Inc. cease and desist from carrying out prior to Commission approval its two-level system of rates based upon vessel flag; and

(2) Any and all tariff rates implementing such system be stricken from the Conference tariffs.

By the Commission.

THOMAS LISI
Thomas Lisi
Secretary

(SEAL)

Prehearing Order

United States Court of Appeals
for the District of Columbia Circuit

Filed Sep 22 1966

NATHAN J. PAULSON
Clerk

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,350 September Term, 1966

PERSIAN GULF OUTWARD FREIGHT CONFERENCE,
Petitioner,

v.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

Before:

FAHY, *Circuit Judge*, in Chambers.

Counsel for the parties in the above-entitled case having submitted their stipulation pursuant to Rule 38(k) of the General Rules of this Court, and the stipulation having been considered, the stipulation is approved, and it is

ORDERED that the stipulation shall control further proceedings in this case unless modified by further order of this court, and that the stipulation and this order shall be printed in the joint appendix herein.

Prehearing Stipulation

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

PERSIAN GULF OUTWARD FREIGHT CONFERENCE, Petitioner, v. FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA, Respondents.	No. 20,350

Petitioner and Respondents, by their respective counsel, hereby stipulate and agree that the questions presented in this proceeding are:

(1) Was the Commission's order of July 22, 1966, improper because the Commission has no authority to issue a cease and desist order in this case without a full evidentiary hearing, under sections 15, 22 and 23 of the Shipping Act, 1916, as amended (46 U.S.C. 814, 821, and 822), Sections 5 and 7 of the Administrative Procedure Act (5 U.S.C. 1004 and 1006), and the Commission's own Rules of Practice and Procedure (46 CFR 502.142)?

(2) Was the Commission's decision of July 22, 1966, contrary to section 15 of the Shipping Act, 1916, in that it found that the Conference's

[2] rate structure was un-

authorized by the Conference's approved agreement as a matter of law?

Respectfully submitted,

ELMER C. MADDY

RONALD A. CAPONE
Attorneys for Petitioner

WALTER H. MAYO III
Attorney for the Federal
Maritime Commission

IRWIN A. SEIBEL
Attorney for the United States

Washington, D. C.
September 14, 1966

Order to Show Cause

FEDERAL MARITIME COMMISSION

DOCKET No. 66-27

THE PERSIAN GULF OUTWARD FREIGHT CONFERENCE (AGREEMENT 7700)—ESTABLISHMENT OF A RATE STRUCTURE PROVIDING FOR HIGHER RATE LEVELS FOR SERVICE VIA AMERICAN-FLAG VESSELS VERSUS FOREIGN-FLAG VESSELS

Agreement No. 7700, approved May 28, 1946, is the basic conference agreement of the Persian Gulf Outward Freight Conference. By this agreement its two members, Isthmian Lines and Central Gulf Lines, both American-Flag lines, obtain their authority to act and function as a conference, performing the usual and normal functions thereof, in the trade from the U. S. South Atlantic and Gulf ports to ports in the Persian Gulf and adjacent waters in the range west of Karachi and northeast of Aden (but excluding both Aden and Karachi). Under Section 15 of the Shipping Act of 1916, as amended, approval of said agreement exempts the members of the conference from the anti-trust laws of the United States, such exemption covering all concerted activities of the conference and its members which are either permitted by the express terms of the approval agreement, or are interstitial in nature.

[2] On March 10, 1966, said conference filed with the Commission revisions to its Freight Tariff No. 8, FMC No. 1, affecting the rates on certain specified commodities. The revisions provide for a two-level rate structure in that they establish for each of the commodities concerned two rates—one rate if shipped via U. S. flag vessel, and another rate, in all instances lower by a differential varying between approximately 5% and 42% if shipped via foreign-flag vessel. The conference already has an approved dual rate system, but the above revisions appear in no way to be related thereto.

The two-level rate structure manifested by the above revisions to the conference tariff appears to be a new form of anti-competitive device, not used elsewhere in the foreign commerce of the United States, which is neither expressly authorized by the terms of the approved conference agreement nor interstitial. Therefore, it appears to be beyond the scope of authority of the conference, and denotes a new agreement between the member lines of the conference which requires approval under section 15 of the Shipping Act, 1916, as amended, before said tariff revisions may be filed by the conference pursuant to Agreement No. 7700.

Article 1 of Agreement No. 7700 covering the operations of the Persian Gulf Outward Freight Conference provides that:

> "This agreement covers the establishment and maintenance of agreed rates, charges and practices for or in connection with transportation of cargo by members of this Conference."

It appears that the above-quoted language of Agreement No. 7700 does not

[3] encompass the authority to establish a two-level rate structure which provides for higher rates on cargo transported in American-Flag vessels

than for cargo transported in Foreign-Flag vessels and that the establishment of such rates introduces an entire new scheme of ratemaking and discrimination not embodied in the basis agreement requiring specific approval pursuant to section 15 of the Shipping Act, 1916.

The conference has not submitted to the Commission a request for the modification of its organic agreement to specifically set forth therein the authority required to establish and maintain the two-level rate structure at issue pursuant to section 15, Shipping Act, 1916, which rate structure is being effectuated by the member lines.

Section 15 provides in part that:

> "Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; . . ."

It, therefore, appears that the publication and effectuation of the two-level rate structure at issue by the member lines of the Persian Gulf Outward Freight Conference may constitute the carrying out of an unfiled, unapproved agreement in violation of the terms of section 15.

The issues raised herein do not involve any disputed issues of fact requiring an evidentiary hearing, and require a prompt determination by the Commission.

[4] Now Therefore, Pursuant to sections 15 and 22 of the Shipping Act, 1916, and Rule 5(f) of the Commission's Rules of Practice and Procedure:

Order to Show Cause

IT IS ORDERED, That the Persian Gulf Outward Freight Conference and the member lines thereof show cause why the tariff revisions filed with the Commission on March 10, 1966, effective March 11, 1966, instituting a two-level rate structure based upon vessel registry should not be declared unlawful and, therefore, why such rates should not be ordered stricken from the tariff. This proceeding shall be limited to the submission of memoranda of law which shall be filed by respondents no later than the close of business May 13, 1966. Replies thereto shall be filed by Hearing Counsel and interveners, if any, no later than the close of business May 27, 1966. An original and 15 copies of the memoranda of law are required to be filed with the Secretary, Federal Maritime Commission, Washington, D. C. 20573. Copies of any papers filed with the Secretary should also be served upon all parties hereto. Oral argument will be heard in Room 114, 1321 H Street, N. W., Washington, D. C., at 9:30 A. M. on June 22, 1966.

IT IS FURTHER ORDERED, That the Persian Gulf Outward Freight Conference and its member lines, Central Gulf Steamship Corporation and Isthmian Lines, Inc., are hereby made respondents in this proceeding.

IT IS FURTHER ORDERED, That this order be published in the Federal Register and a copy of such order be served upon each respondent.

Persons other than respondents and Hearing Counsel who desire to become a party to this proceeding shall file a petition to intervene in accordance

[5] with Rule 5(1) [46 CFR 502.72] of the Commission's Rules of Practice and Procedure no later than the close of business May 2, 1966 with copy to respondent Conference.

By the Commission

THOMAS LISI
Secretary

(SEAL)

Appendix A

Mr. James C. Pendleton, Secretary
The Persian Gulf Outward Freight Conference
11 Broadway
New York, New York 10004

Isthmian Lines, Inc.
90 Broad Street
New York, New York 10004

Central Gulf Steamship Corporation
1 Whitehall Street
New York, New York 10004

Reply to Order to Show Cause

BEFORE THE

FEDERAL MARITIME COMMISSION

DOCKET No. 66-27

THE PERSIAN GULF OUTWARD FREIGHT CONFERENCE (AGREEMENT 7700)—ESTABLISHING OF A RATE STRUCTURE PROVIDING FOR HIGHER RATE LEVELS FOR SERVICE VIA AMERICAN-FLAG VESSELS VERSUS FOREIGN-FLAG VESSELS

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[20] In the revised tariff, respondent has added to its formerly established rates, a new set of rates, pertaining to the same classifications of cargo, which are lower, in varying amounts than the formerly established rates. The revised tariffs are similar to a rate structure used in the trade served by the Conference. See transcript of testimony of Orestes Christophides in Docket 1079, Volume III, pp. 541 and 544. According to the terms of the tariff, the formerly established rates now apply only to cargo carried on American flag vessels; the added rates apply only to cargo carried on foreign flag vessels. No rates have been increased, and no commodities have been added or removed from the categories of cargo carried by the Conference. The only change is the reduction of rates on cargo carried by foreign flag vessels.

Unlike the agreements in the above cases, the revised tariff is directed exclusively to "routine" rate changes. There are no supplemental agreements, no equalization rules, no re-interpretations of the Agreement. Further, there is no exclusive patronage arrangement extending preferential rates only to one shipper or shippers signatory

to a contract; and no shippers are made subject to any liquidated damages provisions.

[21] Certain reduced rate contracts have been allowed to be utilized without Commission approval. These rates, which are termed "project rates" are defined as:

> "... reduced rate[s] on the materials and equipment to be employed by the shipper or consignee in the construction or development and, in some cases, the maintenance and operation, of a certain, named facility used in manufacturing processes, the exploitation of natural resources (including agricultural), or other productive enterprise or service facility. The materials and equipment may not be shipped for the purpose of resale and all cargoes of shippers who receive the benefit of such rates and which move in the particular trade for use in the same enterprise or facility are to be shipped exclusively on the vessels of the rate-maker." *Fact Finding Investigation No. 8, May 24, 1965, Report of E. Robert Seaver, Investigating Officer,* p. 539.

They have been made available to ship materials and equipment necessary for the development, construction, maintenance and expansion of manufacturing plants, refineries, hotels, and even to ship materials used in producing nitrates, steel or gasoline. Examiner Seaver reported, at page 544, that twenty-three Conferences and sixty-three independent lines employ project rates.

> "In Docket No. 693, *In the Matter of Agreement No. 6870,* 3 FMB 227, the Federal Maritime Board in 1950 approved a conference agreement under Section 15 of the Act which contained a provision which permitted a conference to enter into 'oil company contracts' • • • The Board determined that such contracts, which are essentially the same as the

> project rate arrangements, did not violate Sections [22] 14, 16 or 17 of the Act. The Board also determined that the facts in that particular case did not show that the agreement would be unjustly discriminatory or unfair as between the parties named in the statute or operate to the detriment of the commerce of the United States or be in violation of the Act in violation of Section 15. It should be noted that the basic conference agreement involved there provided for the institution of the oil company contract system. This provision is unusual. The writer examined a sampling of typical conference agreements and found that they do not contain provisions in regard to project rates. They do, of course, provide that one of the activities of the conference shall be the establishment of rates to be charged by all the members." *Fact Finding Investigation No. 8, May 24, 1965, Report of E. Robert Seaver, Investigating Officer,* p. 544.

It is persuasive that project rates have been allowed without separate Commission approval where the basic conference agreement has the same provision for establishing rates as Agreement 7700, and in spite of the fact that, unlike the revised tariffs at issue here, they are characterized by a preferential and exclusive patronage contract.

Just as project rates make the relationship between carriers operating in the foreign commerce of the United States and carriers operating from foreign ports to the same areas of destination a more competitive one, the revised tariffs serve to encourage competition between the Persian Gulf Outward Freight Conference and the 8900 Group, which two conferences serve substantially

[23] the

same trade. In Docket No. 1105, the Commission found, among other facts, that:

• • •

Transcript of Oral Argument

ELMER C. MADDY for the Persian Gulf Outward Freight Conference.*

[22] If it introduces an entirely new scheme or rate combination and discrimination not embodied in the basic agreement, it represents a new course of conduct, a new arrangement for the regulation and control of competition —not limited to the pure regulation of intra-conference competition, or constitutes an activity, the nature of which cannot be ascertained by a mere reading of the basic agreement —yet, I submit to you the mere recital of these tests to [23] determine whether there is a Section 15 violation show that many, if not all of them, raise factual issues. A hearing would develop that the adoption of these rates are not an entirely new scheme of rate combination and discrimination.

These types of rates have been utilized previously in this trade by the Kulukundis—This is developed in the record in 1079. They have been utilized on occasion in the India trade. I also believe that prior to World War II in the North Atlantic trade the conference maintained a two-level rate system based upon the type of ship involved.

I believe there was also a two-level rates employed in the Intercoastal trade back before World War II.

Commissioner Hearn: When did Kulukundis have this other rate, Mr. Maddy? Was that before World War II or recently?

Mr. Maddy: My recollection is around—it was before the break up of the conference there. My recollection is in the area of 1959 to 1960, 1961, somewhere.

Commissioner Hearn: At the time Kulukundis was a member of the Conference—or were they independent?

Mr. Maddy: They are independent.

Commissioner Hearn: Independent?

Mr. Maddy: Yes.

Thus, I submit that these rates are not unique and unprecedented as Hearing Counsel contends and that a hearing would actually develop these factually. In addition, this

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* As corrected in accordance with the Commission's Rules by letter of July 11, 1966.

[24] Conference and many other conferences have utilized project rates which involve contracts with third parties relying upon the general rate fixing powers under their agreements.

As Examiner Seaver stated in his decision in fact-finding investigation No. 8, it should be noted that the basic conference agreement involved there provided for the institution of the oil company contract system. This provision is unusual. The writer examined a samplying of typical conference agreements and found they do not contain provisions with regard to project rates. They do, of course, provide that one of the activities of the conference should be the establishment of rates to be charged by all of the members. Yet, these project rates are characterized by exclusive patronage contracts, whereas the rates in issue here are not.

Certainly whether the new rates are discriminatory, as Mr. Kline argues, present a factual issue as this Commission and its predecessors many times have ruled.

Certainly we contend that what has been done here is not anti-competitive, but to the contrary it makes the conference lines more competitive with the 8900 lines. This is one of the tests as to whether or not an action does constitute a separate Section 15 agreement.

Now, further, in this proceeding, at least in its memorandum, Hearing Counsel relied upon the Commission's use of an order to show cause proceeding in the case of the [25]—imposition of surcharge by the Far East Conference in Searsport, Maine.

Now, in this case the respondent is contesting the Commission's use of that type of proceeding in the Court of Appeals for the District of Columbia, and as yet the court has not issued its decision.

However, on the oral argument as reported in the Congressional Information Bulletin for April 29 of this year, Judge Danaher was critical of the procedure used in this case. According to CIB, it was stated as follows: Judge Danaher remarked that he could not get out of his mind the weeks of hearing in the original docket after which Federal Maritime Commission found the conference was justified in opposing the surcharge at Searsport, Maine, and then, in a couple of weeks' notice, Federal Maritime Commission should undo everything it had done.

I am quoting the following remark, "In his remarks the Judge used the term kangaroo-type proceedings under attack."

In our memorandum we have cited the Trans-Pacific Coast Case, in which the Commission issued an order directing respondents to show cause why it should not be ordered to cease and desist from certain actions taken pursuant to Section 15 agreement. There the Commission decided the matter based upon affidavit and memoranda of law and oral argument.

In this case the court said as follows: The Board [26] relies for its authority on Sections 22 and 15 of the Shipping Act. When a sworn complaint has been filed, Section 22 gives the Board power to investigate it in such manner and by such means and to make such order as it deems proper, including an order for reparation to the complainant for injury caused by violation of the Act. Section 22 must be read in conjunction with Section 23, which provides that order of the Board relating to any violation of the Act shall be made only after full hearing.

We need not decide here whether the full hearing contemplated by the statute was held in this case. We think it clear, however, from both the wording and context of Section 22 that the order which the Board may issue under the

section is one which may be premised upon a violation of the Act.

Now, the Commission's own rules of practice and procedure require that adjudication proceedings in which a hearing is required by statute, normal hearing, shall be conducted pursuant to Section 7 of the Administrative Procedure Act.

This provision is in accordance with Section 5 of the Administrative Procedures Act. Section 7 of the Administrative Procedures Act specifically provides that every party shall have the right to present his case or defense by oral or documentary evidence to submit rebuttal evidence, and to [27] conduct such cross examination as may be required for a full and true disclosure of the facts, that a full evidentiary hearing is required can be seen from the Commission's own rules of practice, which require the consent of respondent before a short procedure may be used.

Another demonstration of this requirement is that the Commission asks for the power to issue orders in advance of full evidentiary hearings. Thus, recognizing that it did not have such power at the time of the amendment to the Shipping Act in 1961. At that time such power was not granted by Congress.

Also, from another point of view, this proceeding which requires respondent to show cause why certain tariff provisions should not be declared unlawful and stricken from the conference tariff reverses the entire thrust of Section 15, which directs that the Commission shall approve agreements in tact unless one of the specified findings prerequisite to disapproval, cancellation or modification of the agreement.

Now, the respondents in this proceeding contend that they are entitled to adopt the rates at issue under the following language of Article 1 of their basic agreement, which

provides: This agreement covers the establishment and the maintenance of agreed rates, charges and practices for or in connection with the transportation of cargo by members of this [28] Conference.

It is our position that the main language of this agreement authorizes respondent to adopt these rates. The language of the agreement cannot be more plain, specific or inclusive in this respect, and by the terms of the agreement no types of rates were excluded.

In addition, since the amendment to Section 15 enacted in 1961 by Public Law 87-346, it has been made doubly clear that the adoption of rates by conferences do not require separate Section 15 approval.

Prior to 1961, the statute contained no such language, but since that time by statute it has been made clear that tariff rates, fares and charges and classifications, rules and regulations, explanatory thereof, agreed upon by approved conferences and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval. Regardless of what other types of conference action requires separate rate Section 15 approval, I submit to you that this amendment to the law in 1961 makes very clear the right to adopt rate changes without separate Section 15 approval.

Now, no issue has been raised in this proceeding about whether these rates are otherwise in accordance with the law. Certainly had such issues been raised, an evidentiary hearing would have been required as evidenced by the various [29] questions raised by Hearing Counsel during the course of his oral argument here this morning.

In this proceeding there are no contracts involved. Respondents have merely reduced rates on their Foreign-Flag vessels, in order to compete with the Foreign-Flag vessels of the 8900 group now quoting such lower rates, and in an endeavor to survive in the trade.

If they cannot so operate in this trade as American-Flag operators at compensatory levels operating as they do, as unsubsidized operators, they will have no alternative but to leave the trade.

That is my argument.

Chairman Harllee: Mr. Maddy, it is not entirely clear in my mind whether you think there should be evidentiary hearing about this double level of rates or not. Does your client believe there should be evidentiary hearing?

Mr. Maddy: Yes. Our position is that there has to be an evidentiary hearing to pass upon the issue whether or not this is a separate Section 15 approval.

Chairman Harllee: Now, do you believe that pending this evidentiary hearing that from the time—if one were ordered from that time until the time it is completed, do you think the double level of rates should be permitted to be in existence?

Mr. Maddy: Yes, until there has been a finding that [30] there is a Section 15 violation, I don't think the Commission would have the power to order the Conference to cease and desist or cancel those particular rates.

Chairman Harllee: Well, of course, Section 15 indicates that the Commission should approve any agreement not found thus and so—rather, should by order after notice of hearing disapprove an agreement after it is found thus and so—but the matter of the double level of rates has not been submitted as an agreement, has it?

Mr. Maddy: It has not; and we say that it was unnecessary, because we have the power to make rates under our basic agreement, and therefore it is not a separate Section 15.

Chairman Harllee: This material about the previous double level of rates that you mentioned this morning, the Docket 1079, Indian Trade North Atlantic, prior to World

War II, Intercoastal, so forth, how did it happen you didn't cover that in your brief?

Mr. Maddy: Well, Admiral Harllee, if you will recall, we were told to submit memoranda of law. We were told specifically not to submit any affidavits of facts.

Chairman Harllee: Don't you think that it bears on the legal propriety of it, whether it was done before or not? In other words, the Hearing Counsel brought up several points indicating such as the fact that dual rate contracts were required to be approved, prohibition of brokerage, specific [31] port equalization—he thought those things pertained to the legal aspects of it.

Mr. Maddy: Admiral Harllee, I certainly think these are factual matters which do pertain to the question of whether or not it is a Section 15 agreement.

I think we should be given the opportunity to make these factual presentations. We did point out this specific testimony in Docket 1079, in our legal memorandum.

However, I could give you a specific citation. As to other matters I have mentioned and submit a showing by affidavit—well, I was kind of in a quandary to show how to bring it before you gentlemen. I think that is why the hearing is so essential.

There are issues involved here which you should have before you before you make this determination.

Chairman Harllee: You referred to the Trans-Pacific Case and I think the Hearing Counsel differentiated between this and that, and that was a question of whether or not an existing Section 15 agreement was being carried out. In the matter of the neutral body and how the neutral body was selected. In this case the Hearing Counsel contends that it is a question of agreement that has not been approved.

Do you recall the differentiation that he made there?

Mr. Maddy: Of course, we do submit that we are acting under our article. That is our position. I think he [32] also

sought to refer to the fact that the court may have reserved the point of whether the Commission might have an interim cease and desist power, where there was an allegation that a conference was acting outside of the scope of its Section 15 agreement; but I would submit to you that that distinction is not relevant here, because here there is no pending factual hearing.

Under the Board's proposed order to show cause, there would not be any sort of interim cease and desist power. It would be the final order directed to us. And the court did not make any reservation with respect to that situation.

Chairman Harllee: Well, I don't think that clearly gets at the distinction as to whether Hearing Counsel's view, that this is not an agreement that has been submitted and approved—and in that case it is a question of interpretation of agreement, of the Trans-Pacific Case. But in relation to the Isbrandtsen versus United States Case, 1954, the Hearing Counsel brought up unusual control of competition has been felt to require separate approval. He brought up this specific European Coast equalization rule. What distinction do you make between the Pacific Coast European rule and the present one?

In that case it was found that the Commission did have power to simply order to be stricken from the tariff.

Mr. Maddy: Now, that was the Commission decision. [33] It did not go to court.

Chairman Harlee: Yes, sir.

Mr. Maddy: But I think here is one thing you also have to take into account. You do have this specific language since 1961 in Section 15 with respect to rates. This is something which need not have separate approval.

Now, there is no such language in Section 15 with respect to equalization rules. Here we are dealing with rates.

Chairman Harlee: Do you think the Commission was in error in the Pacific Coast European Conference's port equalization rule case of 1963?

Mr. Maddy: Admiral Harlee, I don't mean to argue the merits or impropriety or the action of the Commission in that case. I say that it is not a valid precedence for our case.

Chairman Harlee: What is the distinction that you draw?

Mr. Maddy: Well, first, we are dealing with rates—

Chairman Harlee: That was a rate. That dealt with rates too.

Mr. Maddy: It dealt with equalization practice.

Chairman Harlee: What did they equalize—they equalized rates.

Mr. Maddy: I would say, then, that, based upon the [34] language in the Trans-Pacific Case, that the Commission had no power to do that in the case.

I don't, Admiral Harllee,—I am not sure—did they raise the question of a right to a factual hearing in that case? I don't recall.

Chairman Harllee: Yes, they did.

Mr. Maddy: Did they?

Chairman Harllee: Yes. Hearing Counsel brought up an argument relating to what he believed to be in necessity that an activity—that is a listing of rates had to be such that by its nature that it could be ascertained by a mere reading of the basic agreement. Do you remember that argument?

Mr. Maddy: Based upon your decision in the joint agreement case?

Chairman Harllee: Yes.

Mr. Maddy: I submit to you that by a mere reading of this agreement what we have done is we have taken action with respect to rates and this language is clear. That is all we have done.

There are various types of rate actions conferences take which do not always result with a single level of rate. For example, from time to time in some conferences there have been volume rates of a type which give you two levels of rates. You also, as I pointed out, you have project rates which give [35] you two levels of rates. All of these things have been done under existing language of the very type involved here.

Chairman Harlee: You quoted Mr. Seaver's report in his fact-finding investigation, but of course that hasn't been approved by the Commission or by a court. So, I think the Hearing Counsel has some doubt upon the utilization that is a precedent, and I think the courts have held that mere inaction by the Commission does not validate a procedure. Isn't that right?

Mr. Maddy: That is right.

Chairman Harlee: On Page 20 of your reply you say that this case involves a new set of rates.

Mr. Maddy: New what?

Chairman Harlee: New set of rates.

Mr. Maddy: True. It does involve new rates for the Foreign-Flag vessels.

Chairman Harllee: But the phrase "new set of rates" is used rather than just the phrase "new rates". Don't you think this takes us somewhat out of the category of routine rates?

Mr. Maddy: No, I would not. To me these are separate rates for Foreign-Flag vessels.

Chairman Harllee: Now, the Hearing Counsel has made an argument relating to new course of conduct. I am bringing up these things to give you a chance to try to hit the nail on [36] the head with regard to his argument, where it appears to me it hasn't been hit on the head.

Hearing Counsel has brought up an argument with regard to the American Union Transport versus River

Plate Brazil Conference, with relation to consider passing upon matters involving brokerage, and he therefore says that agreement representing a new course of conduct has been held to require separate approval. And he analogizes that to this by saying this double level of rates is a new course of conduct.

Do I interpret your answer to go back to your comments about Docket 106, Indian Trade North Atlantic Trade and Intercoastal Trade, would that be your answer to that?

Mr. Maddy: Yes. We submit that it is not a new course of conduct. I think the point that I did make previously, if you look at all of his various tests that he derives from these cases for Section—whether or not it does violate Section 15—to me they raise factual questions. That is my point.

Chairman Harllee: Well, he thinks they raise legal questions.

Mr. Maddy: Admiral Harllee, I submit to you they certainly raise mixed questions of fact and law, and you cannot properly apply the law without the benefit of the facts.

[37] Chairman Harllee: When you submit memoranda of law, do you contend it isn't possible to bring in a fact which relates directly to the law and which establishes, for example, that something isn't a new type of agreement or new power?

Mr. Maddy: Admiral Harllee, as a practicing lawyer, when I go before a court and somebody tells me to submit memorandum of law, I understand I can make legal arguments, but I cannot raise factual issues. And in order to bring factual issues in here, you specifically said is limited to the submission of memorandum of law, and specifically eliminated the usual—which you have quite often done—allowing us to submit affidavits.

I think under those circumstances my interpretation was quite correct.

Chairman Harlee: You contend that you are precluded from even indicating whether something is legal in terms of whether it has been done before or not?

Mr. Maddy: I am saying you have foreclosed this from a proper hearing by the procedure you have utilized here.

Chairman Harlee: Well, it is difficult for me to accept that you cannot bring up something that has been done before if that pertains to the legality of it.

Mr. Maddy: As I said, we did with respect to 1079. How do you approve these, Chairman Harllee, if we are not allowed [38] to put in affidavits—

Chairman Harllee: I don't know that you have to prove them. It seems to me, since you contend one of them, namely, Docket 1079, you could have contended the other. Doesn't the—

Mr. Maddy: Excuse me, 1079—I could cite you a page of reference in a Commission decision in the transcript, whereas to the others I could not. I would have to prove that some way.

• • •

[43] Chairman Harllee: But if I understand it, perhaps the key difference between you and Mr. Kline is that you believe that in the interim pending the conclusion of the evidentiary hearing that the rates have to remain in effect, but since you don't think any agreement has to be filed, that they cannot be disapproved or be changed when the hearing is over. That is your position?

Mr. Maddy: Yes.

Chairman Harllee: Of course, the Hearing Counsel feels that pending the completion of the evidentiary hearing that the rates should be struck down rather than this different rate level should be struck down and not approved because it is an agreement. This is the difference of opinion, isn't it?

• • •

Transcript of Oral Argument

REBUTTAL ARGUMENT BY NORMAN D. KLINE, HEARING COUNSEL, FEDERAL MARITIME COMMISSION

[49] It has been mentioned that the Kulukundis Line—something like that—Docket 1079, the record that shows there two levels of rates that had been used by the Kulukundis Line first of all is not a conference. The conferences were established to set up or to establish uniform rates, not give levels of rates on the basis of vessel registration.

They were supposed to peg their rates at a fixed uniform level. In addition to that fact, if you look into the record in 1079 you will find out that that Kulukundis Line was really two lines. There was a foreign line called Kulukundis Lines Limited, Liberian Corporation, and there is a Kulukundis Corporation Line which is an American corporation. Two separate [50] lines.

Commissioner Hearn: Mr. Maddy admitted it was independent when he used it as an example.

• • •

[62] Chairman Harlee: Let me put it one other way. Do you think that it is conceivable that by affidavits of fact, which apparently were precluded, that it could be established that this two level system of rates was routine and was not extraordinary and unusual. Could you comment on that?

Mr. Kline: My comments on that is that it is already in court approved Commission cases which states—the Commission is enabled to look at something which is filed, which on its face appears to be unusual.

This does on its face—it is discriminatory—without further facts can compare that thing that is filed with the basic Conference agreement; and as a matter of law, not a fact, not of facts, merely by virtue of those two [63]

things, having a basic agreement, and the system presented to it, with an apparent discrimination and without any further facts as a matter of law can determine that the conference exceeded its authority. This was upheld in an American Export Case.

Chairman Harlee: This doesn't hit the nail on the head—actually in terms of whether or not the precluding of a party from bringing in facts bearing on whether or not this is extraordinary, unusual, is a factor in this case. Do you see what I mean? In other words the contention might be made—

Mr. Kline: Yes, sir.

Chairman Harlee: Since affidavits of facts couldn't be established, that it couldn't be established—well, if this thing had been done quite a bit before—

Mr. Kline: Firstly, you have to assume that such a thing could be proved, that this thing would be not unusual, but very routine which I don't think—but for your questions, should they be given the opportunity to try to show this has been done many times—

Chairman Harlee: My question is, were they precluded by these procedures from doing that, and if so, is that a factor in this case?

Mr. Kline: They were precluded from submitting evidence, factual evidence that this system might have been used by Conferences and other trades, that is true.

[64] The next question is—

Chairman Harlee: Is that a factor in this case?

Mr. Kline: Is that a factor in this case—I say no, because there are enough facts in this case, simple facts we have in this case, for the Commission to look at the system as it appears right from the face of the tariff and to determine that that is apparently discriminatory, higher for U.S. flag, lower for foreign flag, right on the face of the tariff, and that the Commission can note as has never

been done before. They can take official notice of its tariffs. Nothing like this has ever been seen in the official Commission—

Chairman Harlee: You are saying now that the Commission can take official notice of the tariffs?

Mr. Kline. Certainly.

• • •

REPLY BRIEF FOR PETITIONER

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 20,350

PERSIAN GULF OUTWARD FREIGHT CONFERENCE,

Petitioner,

v.

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF FEDERAL MARITIME COMMISSION ORDER.

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REPLY BRIEF FOR PETITIONER

Statement

This brief is in reply to the brief for respondents.[1]

The Conference has endeavored to avoid, to the extent possible, repetition of arguments set forth in its opening brief.[2]

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[1] Respondents' brief will be referred to as "FMC".

[2] The following should be noted in regard to the jurisdictional statement in petitioner's opening brief.

The Judicial Review Act of December 29, 1950 was repealed by section 8(a) of the Act of September 6, 1966, Pub. L. 89-554, 89th Cong., 80 Stat. 632, 656, enacted after the petition for review was filed with this Court. Section 4(c) of the 1966 Act, 80 Stat. 621-625, amended title 28 U.S.C. to incorporate the provisions of the 1950 Act as chapter 158, sections 2341 through 2352.

In line with their view of the case, that is, that the facts in this proceeding are not in dispute, the respondents have limited their counterstatement of the case to a discussion of the legal steps taken in this case. However, this brief clearly shows the dispute as to relevant facts which is involved here and which required the Commission to grant the petitioner a full evidentiary hearing before issuing its Order of July 22, 1966. The respondents' factual allegations can be found in their discussion of the second issue herein as to whether the Commission erred in finding that petitioner's rates violated § 15 of the Shipping Act (FMC 14-17). The Commission, in instituting its investigation, stated as follows:

> "The two-level rate structure manifested by the above revisions to the conference tariff appears to be a new form of anti-competitive device, not used elsewhere in the foreign commerce of the United States, • • •" (JA 23)[2]

Respondents' brief continues to maintain this position:

> "Petitioner's conduct on its face can hardly be said to be a routine activity, however. The dual level scheme had never been used by petitioner, or apparently anyone else." (FMC 17)

But petitioner has maintained from the very beginning that there is nothing new in the rates that it has set and this could be shown at a hearing. A hearing would show that such rates have been set in this trade and an adjacent trade in which the Commission-approved conference is administered by the same secretary and office as the Persian Gulf Outward Freight Conference and that in addition

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[2] Throughout their brief (FMC 2, 11, 14) respondents put the word revisions within quotation marks, as if this word is inappropriate. It can be seen that the Commission was the first to refer to the Conference's tariff revisions as such.

such rates were set in the North Atlantic Trade before World War II. Since respondents have placed the discussion of this factual dispute in their legal argument rather than in the statement of the facts, this reply will do the same.

ARGUMENT

I.

Respondents concede that "a hearing is required since this is an adjudication."

Respondents state:

> "* * * it is conceded that a hearing is required, since this is an adjudication. *Philadelphia Co.* v. *Securities and Exchange Commission*, 84 U.S. App. D.C. 73, 175 F.2d 808 (D.C. Cir. 1949)[4]. The question is what sort of a hearing will suffice to meet the constitutional and statutory requirements?" (FTC 5-6)

The very case cited by respondents points out "what sort of a hearing will suffice." In that case, this Court said:

> "[The SEC] failed to introduce or receive evidence, to hear witnesses, to permit cross-examination, and to make a proper transcript of record. Accordingly its 'hearing' did not satisfy the requirements, for adjudicatory action * * *." *Philadelphia Co.* v. *SEC*, *supra*, 175 F.2d at 818.

The Supreme Court has also emphasized the importance of using proper procedures when governmental agencies adjudicate:

> "Thus, when governmental agencies adjudicate or make binding determinations which directly affect

[4] Vacated with instructions to dismiss as moot on joint motion of the parties, 337 U.S. 901.

> the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." *Hannah* v. *Larche*, 363 U.S. 420, 442 (1960). See also *Federal Power Comm'n* v. *Texaco*, 337 U.S. 33, 44-45 (1964).

The respondents say that the procedure followed in this case is "authorized and appropriate" because the facts are not in dispute. Yet the *Philadelphia Co.* case, *supra*, they cite rejects this argument:

> "• • • the Commission asserts that 'None of the facts herein recited relative to that situation [the Pittsburgh Railways group] are in dispute.' But Philadelphia asserts in its briefs that there are factual issues between it and the Commission material to the proposed revocation of the exemption. Whether or not material issues of fact exist we can determine only after an appropriate hearing and a proper record." 175 F.2d at 818-19.

Respondents also state (FMC 5) that the procedure followed here is authorized by Rule 5(f) of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.66 which provides as follows:

> "The Commission may institute a proceeding by order to show cause. The order shall be served upon all persons named therein, shall include the information specified in Rule 10(c), may require the person named therein to answer, and *shall require such person to appear at a specified time and place and present evidence upon the matters specified.*" (Emphasis supplied).

Obviously, the italicized words provided that the Commission would afford petitioner the right to present its evidence whereas the Commission specifically limited petitioner to a memorandum of law.

Respondents also cite *United States Navigation Company* v. *Cunard Steamship Co.*, 284 U.S. 474 (1932). The

citation is not helpful without a page reference since the holding of the case (anti-trust complaint dismissed on grounds of primary jurisdiction of the United States Shipping Board) is not on point here.

Presumably respondents intend to refer to language relating to the power of the Commission to issue orders in respect to unfiled § 15 agreements. But clearly, the Supreme Court expected that an evidentiary hearing would be held before such an order was issued, 284 U.S. at 488.[5]

Respondents not only concede that a hearing is required since this is an adjudication, but also that a hearing is required by statute. They rely (FMC 6, 10) on Rule 10(b) entitled "Hearing required by statute", 46 C.F.R. 502.142, and Rule 10(c), 46 C.F.R. 502.143, and accordingly § 7 of the Administrative Procedure Act, 5 U.S.C. 556(d),[6] is quoted. However, in an attempt to remove the Commission from the requirements of § 7, respondents underline the statutory phrase "as may be required for a full and true disclosure of facts." [sic].[7] (FMC 6).

This is an odd reading of the statute, to say the least. The full sentence, with the punctuation appearing in bold type, reads as follows:

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[5] Respondents (FMC 5) attempt a distinction between a "section 23 Order" and one issued pursuant to section 22 of the Shipping Act, 46 U.S.C. § 821. There is no such distinction.

"Section 22 must be read in conjunction with Section 23, which provides that orders of the Board relating to any violation of the Act 'shall be made only after full hearing * * *'" *Trans-Pacific Frgt. Conf. of Japan* v. *F.M.B.*, 112 U.S. App. D.C. 290, 302 F.2d 875, 878 (1962)

[6] After the petition for review was filed, Title 5, United States Code was enacted into law by Public Law 89-554, 80 Stat. 378, App. Sept. 6, 1966. No substantive changes were made. §§ 5, 7 and 9 of the Administrative Procedure Act became 5 U.S.C. 554, 556 and 558 respectively.

[7] The statute reads "* * * disclosure of the facts."

> "A party is entitled to present his case or defence by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

Clearly the phrase underlined by respondents refers to cross-examination only. The legislative history of this provision confirms without a shadow of a doubt that this is the proper reading of the phrase.

> "The provision for 'such cross-examination may be required for a full and true disclosure of the facts' does not, according to the House Committee Report, "confer a right of so-called 'unlimited' cross-examination. Presiding officers will have to make the necessary initial determination whether the cross-examination is pressed to unreasonable lengths by a party or whether it is required for the 'full and true disclosure of the facts' stated in the provision. Nor is it the intention to eliminate the authority of agencies to confer sound discretion upon presiding officers in the matter of its extent. The test is—as the section states—whether it is required 'for a full and true disclosure of the facts.' In many rule making proceedings where the subject matter and evidence are broadly economic or statistical in character and the parties or witnesses numerous, the direct or rebuttal evidence may be of such a nature that cross-examination adds nothing substantial to the record and unnecessarily prolongs the hearings.' H.R. Rep. p. 37 (Sen. Doc. p. 271)." *Attorney General's Manual on the Administrative Procedure Act* (1947), 78.

See also S. Rep. No. 752, 79th Cong., 1st Sess. (1945), S. Doc. 248, 79th Cong., 2d Sess. (1946) 208-209; Appendix B (Attorney General's comments) attached to S. Rep. 752, in S. Doc. 248 at 228; H.R. Rep. 1980, 79th Cong., 2d Sess. (1946) in S. Doc. 248 at 270-271.

In the same way, respondents try their hand at interpretation of the Commission's Rule 10(c), 46 C.F.R. 502.143.[8] Respondents say:

> "'• • • in its Notice of Hearing, the Commission is instructed to inform petitioner of 'the terms, substance, and issues involved or the matters of fact and law asserted, *as the case may be.*' (Emphasis supplied [by respondents])."

However, respondents do not note the significance of the conjunction *or* in that phrase. The preceding Rule 10(b), 46 C.F.R. the 502.142, makes clear that the Commission is referring to "rule making and adjudication proceedings in which a hearing is required by statute." Thus in Rule 10(c) the Commission is required to give notice of "the terms, substance and issues involved" in the case of rule making proceedings "*or* the matters of fact and law asserted" in the case of adjudication proceedings, "as the case may be." (Emphasis added.)

Clearly, nothing in § 7 or Rule 10(c) authorizes the Commission to follow the improper procedure used in this case and respondents' attempt at analysis of these two provisions to this end utterly fails.

Respondents next discuss the cases they rely on to justify the issuance of the Commission's order of July 22, 1966 without an evidentiary hearing. Respondents first cite *American Export & Isbrandtsen Lines* v. *Federal Maritime Commission*, 334 F.2d 185 (9th Cir. 1964). Petitioner pointed out in its opening brief, p. 23, that in that case the Commission allowed affidavits of fact to be submitted but the respondents elected not to submit such affidavits and thus waived their right to a full evidentiary hearing. Apparently in response to this point, respondents here cite *Producers Livestock Marketing Association* v. *United States*, 241 F.2d 192 (10th Cir.) (1957), affirmed 356 U.S.

[8] Respondents' quotation (FMC 10) appears without citation, directly following a reference to Rule 10(g). However it is clear that the language quoted comes from Rule 10(c).

282 (1958), which was quoted in the *American Export* case. But here again, the petitioner in that case refused to produce evidence and elected to stand upon the illegality of the regulations in dispute as a matter of law, 356 U.S. at 285. The holding in that case quoted by respondents here recognized this:

> "This was done in the instant case and constitutes a 'full hearing' for consideration of the limited contention made by the petitioner in its complaint *and by its election not to submit evidence.*" 241 F. 2d at 196. (Emphasis supplied.)

Respondents then cite five cases which are said to support the issuance of an order without an evidentiary hearing. First, it is said that the Commission has done this in two other cases. In the first cited case, *In Re Pacific Coast European Conference,* 7 F.M.C. 27 (1961), the Commission authorized the filing of affidavits of fact and memoranda of law but "no affidavits of fact or memoranda of law were filed." 7 FMC at 28. In the other Commission case, *Pacific Coast European Conference-Payment of Brokerage,* 4 F.M.B. 696 (1955); 5 F.M.B. 65 (1956), as petitioner pointed out in its opening brief, pp. 22-23, the Commission actually held extensive hearings and accepted affidavits of fact before issuing an order.

Respondents then cite three other cases not decided by the Commission. In *NLRB* v. *J. R. Simplot Company,* 322 F.2d 170 (9th Cir. 1963), unlike this case, there was no suggestion as to what evidence would be produced:

> "They do not suggest what new facts a hearing would develop or what if any evidence would be produced." 322 F.2d at 172.

The same situation is presented by *Mississippi River Fuel Corp.* v. *Federal Power Commission,* 108 U.S. App. D.C. 284, 281 F.2d 919, 927 (D.C. Cir. 1960), cert. denied, 365 U.S. 827 (1961) (" • • • no questions of fact were presented." 281 F.2d 927).

Finally, *Sun Oil Company* v. *Federal Power Commission*, 256 F.2d 233 (5th Cir. 1958), cert. denied, 358 U.S. 872 (1958) presented an entirely different situation than the present proceeding. In that case, the Court defined the question at issue in the following way:

> "If the question was more than a question of administrative policy, and we doubt that it was, it was a question of law. We do not believe there was a case of an adjudication which was required by the statute 'to be determined on the record after opportunity for an agency hearing' where notice is required by the Administrative Procedure Act. 5 U.S.C.A. § 1004". 256 F.2d 240.

But in this case, respondents have conceded that this is an adjudication and that a hearing is required by statute.

Accordingly, none of the cases cited by respondents in support of the issuance of the Commission's order without an evidentiary hearing is in point. All of them involved entirely different situations.

Similarly, the quotation from Davis, *Administrative Law Treatise* § 7.01 (1958) deals with the situation presented by the cases previously discussed and not with the present case where there is a genuine dispute as to the facts and where petitioner has pointed out what facts it can show if it is given an evidentiary hearing. The 1958 Davis quotation (FMC 9) first deals with "non-factual issues of policy" and then with a situation where the facts are not in dispute, citing the *Producers Livestock Marketing case, supra,* which, has been seen, is a case where the petitioner elected not to submit evidence and to stand upon the illegality of the regulations in question as a matter of law. It is noteworthy that respondents do not comment on the 1965 Davis quotation appearing on p. 12 of petitioner's opening brief.

Thus respondents have failed to justify the Commission's issuance of its order without an evidentiary hearing.

282 (1958), which was quoted in the *American Export* case. But here again, the petitioner in that case refused to produce evidence and elected to stand upon the illegality of the regulations in dispute as a matter of law, 356 U.S. at 285. The holding in that case quoted by respondents here recognized this:

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Next, respondents turn to their comments on the cases cited in petitioner's opening brief. Respondents' comment on *Morgan* v. *United States*, 298 U.S. 468 (1936) is that the case "never considered the possibility of having an non-evidentiary hearing where there were no factual issues." (FMC 9). As is abundantly clear, there are factual issues presented in this proceeding.

Then, it is said that petitioner cannot rely on The Final Report of the Attorney General's Committee on Administrative Procedure, 1941, quoted in petitioner's opening brief, p. 13, which said:

> "The forum itself must be one which is prepared to receive and consider all that he offers which is relevant to the controversy."

Respondents' contention is apparently that the Commission may exclude evidence for irrelevancy. But here the Commission has refused to hear evidence, relevant or irrelevant. It has excluded all evidence and limited petitioner to the submission of a legal memorandum. If the Commission had allowed evidence to be offered and then excluded it as irrelevant, petitioner could have made an offer of proof under Rule 10(l), 46 C.F.R. 502.152, and thus made a record for review on appeal. The procedure followed by the Commission, however, denied petitioner the opportunity to make such a record. It is for the Courts to ultimately determine what evidence is relevant, and by excluding all evidence the Commission has prevented this Court from making such a determination.

It will be noted that the respondents have nothing to say in respect to the citations from the legislative history on this point on p. 14 of petitioner's opening brief, nor in respect to the discussion of § 9(a) of the Administrative Procedure Act, 5 U.S.C. § 558(b) [formerly § 1008(a)] on pp. 15-16.

Respondents have, however, the following to say:

> "If, in fact, there was no need to adduce additional facts through the taking and weighing of evi-

> dence, the Commission cannot be faulted for making an unauthorized 'legal' determination. The ultimate conclusion of the Commission, therefore, should be given the weight traditionally accorded administrative decisions rooted in the Commission's view of the facts. *International Packers, Ltd.* v. *Federal Maritime Commission*, — U.S. App. D.C. —, 356 F.2d 808 (D.C. Cir. 1966)."

Respondents begin by saying "If, in fact, • • • " and that is the critical point. The Commission says there is no dispute as to facts and that it is making a purely legal determination. Facts are obviously in dispute in this case and there is no way for the Court to decide whether the facts of the dispute are relevant when the facts are not before them because the Commission has allowed the submission of no evidence, relevant or irrelevant.

But further, since the Commission says it is not making factual determinations but merely "legal" ones then there is no longer any rationale for "the weight traditionally accorded administrative decisions rooted in the Commission's view of the facts." *The International Packers* case cited by respondents illustrates this point for there the Commission was dealing, after hearing, with a "practical difficulty in tariff practices," 356 F.2d 811, whereas here the Commission purports to be making a purely legal determination.

Respondents then argue that petitioner is not prejudiced because the agreement which the Commission says does not authorize the rates filed by petitioner is not in the record and that, indeed, the rates said to be a violation of § 15 cannot be found there either. First, the language used by respondents shows the dangers involved in relying on anyone's description of what the record would show if there were a record. Respondents say:

> "No reason has been suggested why the inclusion of the 'revision' language itself would aid the Court." (FMC 10-11)

But what is involved is not "language" but many different rates. The tariff pages are clearly material to a consideration of whether they are rates or a § 15 agreement. Petitioner has the right to have any piece of evidence, on which the Commission relies, before the Court and there is no evidentiary record in this case, only legal argument.

Furthermore, in discussing its contention that petitioner is not prejudiced by the lack of any evidentiary record, respondents make no mention of the Conference's firm belief that the Commission could not interpret its agreement or its rate revisions without evidence as to the customs of the trade, including evidence as to previous use of such rates, as well as evidence of the competitive rather than anti-competitive nature of the rates in question.

Respondents then turn to petitioner's discussion in its opening brief, pp. 16-21, of the many statements by the Federal Maritime Commission that it does not have the power to issue cease and desist orders without an evidentiary hearing. Respondents (FMC 11) term this "legislative history", and make no mention of the fact that these are admissions by the Commission itself, in annual reports, testimony before a senate committee, as well as in requests to Congress for this power.

The Commission is still requesting such power, for the Commission has refused to furnish petitioner with a draft bill and accompanying papers which constitute the formal request for this power. The Commission, by Mr. Thomas Lisi, Secretary, stated the following in a letter to counsel for petitioner of September 16, 1966, attached as an addendum hereto:

> "You request a copy of legislation proposed by the Commission and submitted for clearance within the executive branch. I am informed by the General Counsel of the Commission that proposed legislation is not available for public distribution while it reposes in the Bureau of the Budget. Accordingly, I cannot comply with your request."

Respondents attempt to distinguish away the Commission's statements and the failure of Congress to act on them on the grounds that the statements only pertained to interim orders:

> "None of the quoted history treated the instant problem, however, since the Commission and Congress were concerned only with the authority to issue *interim* orders designed to preserve the *status quo*."

Similarly, they attempt to make the same distinction (FMC 11) as to *Trans-Pacific Freight Conference of Japan* v. *Federal Maritime Board*, 112 U.S. App. D.C. 290, 302 F.2d 875 (D.C. Cir. 1962). The distinction is not valid. The Federal Maritime Commission does not have the power to issue interim cease and desist orders because it cannot issue an order without an evidentiary hearing under the Shipping Act. This is plain from the Commission's statements and from the Court's opinion in the *Trans-Pacific* case, 302 F.2d 878. Moreover, the distinction between an interim order and a final order in this case is hardly a controlling one for as the Court recognized in the *Trans-Pacific* case,

> " • • • injunctive orders are 'final' in the sense that they dispose of the rights of the parties for a period of time • • •.." 302 F.2d at 878, n.4.

Furthermore, the Commission's issuance of a so-called interim cease and desist order means that at some later time the Commission intends to hold an evidentiary hearing. Here however, the situation is even more improper because the Commission has made a "final" decision and thus never intends to afford petitioner such a hearing on this issue.

Respondents seek to distinguish the *Trans-Pacific* case in three ways:[9]

---

[9] Respondents' discussion of what the Court said it did not decide in this case, 302 F.2d 879, n.8, was fully answered in petitioner's opening brief, pp. 22-23.

> "First, here petitioner was attempting to carry out an unapproved agreement. Second, there was a violation of section 15 since it is unlawful to carry out an unapproved agreement. Third, the order issued in this case is not interlocutory or interim, but final since nothing more remained to be done by the Commission after it determined that there was no approved agreement with respect to the dual level scheme."

The first two points beg the question for there is no unapproved agreement nor any violation of § 15 and there is no evidentiary record before the Commission on which it could properly make such a finding. The third point is, as has been discussed above, without weight.

Moreover, the distinction attempted by counsel for respondents between a so-called interim order and a final order does not appear to have been one which guided the Federal Maritime Commission itself. Adm. Harllee framed the issue in the following words:

> "CHAIRMAN HARLLEE: But, if I understand it, perhaps the key difference between you and Mr. Kline is that you believe that in the interim pending the conclusion of the evidentiary hearing that the rates have to remain in effect, but since you don't think any agreement has to be filed, that they cannot be disapproved or be changed when the hearing is over. That is your position?
>
> "MR. MADDY: Yes.
>
> "CHAIRMAN HARLLEE: Of course, the Hearing Counsel feels that pending the completion of the evidentiary hearing that the rates should be struck down rather than [that] this different rate level should be struck down and not approved because it is an agreement. This is the difference of opinion, isn't it?" (JA 41)

Thus, it will be seen that the Commission may not issue a cease or desist order without giving to petitioner an evidentiary hearing and respondents have not shown to the contrary.

One more point should be noted in respect to this issue. Respondents have failed to discuss in any way petitioner's discussion, p. 25 of its opening brief, of the changed form in which the Commission has issued its Orders to Show Cause since this Court's decision in *Far East Conference* v. *F.M.C.*, No. 19,790, decided September 2, 1966. This change in Commission procedure is significant and again leads to the conclusion that the Commission itself admits that it does not have the power to issue orders without a full evidentiary hearing.

II.

Respondents admit that there is a factual dispute between the parties.

The Commission's Order of Investigation stated (JA 24):

> "The issues raised herein do not involve any disputed issues of fact requiring an evidentiary hearing • • • "

Again, in its decision, the Commission said:

> " • • • there are no material facts in dispute." (JA 12)

As has been seen however the Commission, in instituting its investigation, stated as follows:

> "The two-level rate structure manifested by the above revisions to the conference tariff appears to be a new form of anticompetitive device, not used elsewhere in the foreign commerce of the United States, • • •." (JA 23)

But if anything is clear it is that petitioner has stated specifically and clearly that it can show that the rates it has set have been used before and in the foreign commerce of the United States. Respondents have three different

and inconsistent responses to this situation. First, respondents stubbornly repeat the Commission's position that such rates have never been used before:

> "Petitioner's conduct on its face can hardly be said to be a routine activity, however. The dual level scheme has never been used by petitioner, or apparently anyone else." (FMC 17)

Next, respondents state, disregarding the plain and obvious facts, that petitioner has not suggested that the contrary could be approved if it were given an evidentiary hearing:

> " • • • no suggestion was made as to what might be proved through an evidentiary proceeding. Petitioner merely persisted in an unreasoned assertion that such a hearing would disclose facts which would remove its system from the scope of the Commission decision." (FMC 16)

Finally respondents, illogically, try to prove by reference to statements by counsel for petitioner in legal papers and on oral argument that the facts petitioner says it could show given an evidentiary hearing are untrue (FMC 15).[10]

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[10] Respondents try to prove that petitioner stated that similar rates were established by another conference and that petitioner's references to the testimony in a previous Commission proceeding by a representative of Kulukundis Lines dealt with such rates established by an independent. Respondents' citations do not bear this out. In response to a similar misconception by Commission Hearing Counsel at the oral argument Commissioner Hearn stated: "Mr. Maddy admitted it was independent when he used it as an example" (JA 42). Petitioner did offer to show that a conference had used such rates in the North Atlantic Trade prior to World War II (JA 30), but even if this were not so, the Commission does not state merely that such rates have never been used by a conference—rather, as has been seen, the Commission and now respondents maintain that such rates have not been "used elsewhere in the foreign commerce in the United States" by "anyone". It is clear that this is just not so.

Not content with these three inconsistent positions, respondents say in addition that petitioner was in fact granted the right to produce its evidence but failed to do so:

> "During oral argument, petitioner was afforded an opportunity to file a memorandum of law suggesting any potential areas of factual dispute; as such, petitioner was accorded the statutory 'hearing' prescribed by the Shipping Act." (FMC 4)

There is no citation for this statement to the oral argument nor in fact was petitioner granted the right at oral argument to submit evidence or any other further pleadings. Statements of counsel as to what petitioner could prove if given the right to submit evidence are by no standards of fair procedure a substitute for the right to submit evidence. The Commission was well aware of what was involved here, as the following exchange between Adm. Harllee and Hearing Counsel shows:

> "CHAIRMAN HARLEE: Let me put it one other way. Do you think that it is conceivable that by affidavits of fact, which apparently were precluded, that it could be established that this two level system of rates was routine and was not extraordinary and unusual. Could you comment on that?
>
> "MR. KLINE: My comments on that is that it is already in court approved Commission cases which states—the Commission is enabled to look at something which is filed, which on its face appears to be unusual.
>
> "This does on its face—it is discriminatory,—without further facts can compare that thing that is filed with the basic Conference agreement; and as a matter of law, not a fact, not of facts, merely by virtue of those two things, having a basic agreement, and the system, presented to it, with an apparent discrimination and without any further facts as a matter of law can determine that the conference exceeded its authority. This was upheld in an American Export Case.

"CHAIRMAN HARLEE: This doesn't hit the nail on the head—actually in terms of whether or not the precluding of a party from bringing in facts bearing on whether or not this is extraordinary, unusual, is a factor in this case. Do you see what I mean? In other words the contention might be made—

"MR. KLINE: Yes, sir.

"CHAIRMAN HARLEE: Since affidavits of facts couldn't be established, that it couldn't be established —well, if this thing had been done quite a bit before—

"MR. KLINE: Firstly, you have to assume that such a thing could be proved, that this thing would be not unusual, but very routine which I don't think —but for your questions, should they be given the opportunity to try to show this has been done many times—

"CHAIRMAN HARLEE: My question is, were they precluded by these procedures from doing that, and if so, is that a factor in this case?

"MR. KLINE: They were precluded from submitting evidence, factual evidence that this system might have been used by Conferences and other trades, that is true.

"The next question is—

"CHAIRMAN HARLEE: Is that a factor in this case?

"MR. KLINE: Is that a factor in this case—I say no, because there are enough facts in this case, simple facts we have in this case, for the Commission to look at the system as it appears right from the face of the tariff and to determine that that is apparently discriminatory, higher for U.S. flag, lower for foreign flag, right on the face of the tariff, and that the Commission can note as has never been done before. They can take official notice of its tariffs. Nothing like this has ever been seen in the official Commission—

"CHAIRMAN HARLEE: You are saying now that the Commission can take official notice of the tariffs?

"MR. KLINE: Certainly." (JA 42-44)[11]

What can be learned from the confusing and inconsistent arguments on brief and from this exchange with Adm.

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[11] The Commission did not take official notice of the tariffs. See the Commission's Rule 13(f)(1), 46 C.F.R. 502.226.

Harllee is that despite respondents' statement that petitioner has not suggested what might be proved through an evidentiary proceeding, it is clear that petitioner specifically stated what it could prove if given an evidentiary hearing; that despite respondents' statement that petitioner was afforded an opportunity to show its evidence at the oral argument, petitioner was afforded no such opportunity; that despite respondents attempt to show that the facts petitioner says it could show at an evidentiary hearing are not true, there is no reason to doubt that they are true.

What remains of the disjointed argument made by respondents on brief is their position that such rates have never been set before and petitioner's position that such rates have been set before on a number of occasions and that such rates were well known in the trade to which the Conference's agreement applies.

Consequently, it is clear from respondents' brief that they now admit that there is a dispute as to facts. Petitioner was not afforded an opportunity to present its evidence and the Commission's order was improper for that reason.

III.

The Commission's finding of a § 15 violation was in error.

Respondents devote much of the space in their brief, alloted to this issue, to a discussion of the facts, and petitioner's reply to this discussion is found above. As to the § 15 issue, respondents again quote the grounds (FMC 13) on which the Commission found the § 15 violation. Respondents say that petitioner does not challenge these grounds, if applicable (FMC 14). This is not the case.

As petitioner pointed out, p. 28 of its opening brief, the Commission's decision in *Joint Agreement—Far East Conference and Pac. W.B. Conf.*, 8 FMC 553 (1965), is quoted for the proposition that a separate approval must be obtained for "activity the nature and manner of effectuation of which cannot be ascertained by a mere reading of the basic agreement." The proposition for which this

Commission case is cited is nothing but a narrow reading of the old "plain meaning" rule and the Commission cannot rely on this case for the establishment of such a rule in law. In *American Export & Isbrandtsen Lines* v. *FMC.*, 334 F.2d 185 (9th Cir. 1964).[12] The court quotes a long passage from the Commission decision in that case including the sentence "Moreover, it affects third party interests such as the ports and facilities from which traffic is drawn, and it obviously is not 'a pure regulation of intraconference competition.'" Surely, this concept has no application to the situation which the Commission has created in the Persian Gulf. There, for the first time, the Commission has approved two conferences in the same trade, and it is clear in this situation that the conference's rates are competitive and not anti-competitive.

The other three cases relied on by the Commission, cited in respondents' brief (FMC 13) relate to new schemes, new courses of conduct, and new means of regulating and controlling competition. These cases were discussed in petitioner's opening brief at page 28.

Respondents quote language from *Isbrandtsen Co., Inc.* v. *United States*, 93 U.S. App. D.C. 293, 22, F.2d 51 (1954), and regularly use the words "dual level scheme" (e.g. FMC 17) and "dual level system" (e.g. FMC 19). *Isbrandtsen* held that a dual rate contract required separate § 15 approval. A dual rate contract is an arrangement in which a shipper contracts to to give all his patronage to the conference and in return is usually charged about 15 per cent less

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[12] Respondents have misquoted the Commission's decision substantially, for the Commission does not cite this case here. The footnote which respondents claim to have included in their quotation, which appears at FMC 13 as "*American Export & Isbrandtsen Lines* v. *FMC, supra,*" actually reads in the Commission's decision: "*Pacific Coast Port Equalization Rule, supra,* at 630." Footnotes 5 and 6, which respondents also claim to have included in the quotation, also differ from the Commission's report, for respondents have, without warning, expanded each legal citation to include the Supreme Court reference. There are also two errors in the language quoted, presumably inadvertent.

on his shipment than is the non-contract shipper. Clearly, there is a world of difference between the two arrangements. The shipper is not affected by the rates set by the Conference here for these rates are already available in the trade. The Conference has set rates for the United States Flag vessels which do not differ in any way from its previous rates. It has also instituted rates on many items based on carriage on foreign flag vessels. These rates are competitive with the already existing rates of the 8900 group of foreign flag carriers. Those persons who wish to use an American flag ship have no change in rate and those persons who wish to ship on a foreign flag vessel now have no significant change in rate but a choice of two more services on which to ship their cargo. It can be seen that no amount of repetition of the phrase "dual level scheme" will make the two situations comparable for they are as different as they could be. Indeed, the Commission recognized this in its order to Show Cause:

> "The conference already has an approved dual rate system, but the above revisions appear in no way to be related thereto." (JA 23)

Respondents then turn to petitioner's point that project rates, separate and different rates in most tariffs for the transportation of cargo to industrial projects, are analogous to the rates the Conference has set and that the Commission has never declared such rates to be illegal and that an examiner who investigated the situation based their legality on the same article of Conference agreements as does petitioner here (opening brief, pp. 29-30).

Respondents state that:

> "• • • as the Commission noted, the purported approval of project rates was nothing more than a comment on their existence in an examiner's fact finding investigation." (FMC 15)

That the Commission has not held project rates to be illegal is clear from its decision *In the Matter of Carriage of Military Cargo*, 7 SRR 495, 509 (1966):

> "But if petitioner's construction of Section 14b is now adopted, it would seem obvious that project rate agreements as they have existed historically would be illegal under that section.[24] [Footnote 24: They normally contain few or none of the required provisions under Section 14b and it does not appear that they could and still accomplish the desired result]. Indeed, petitioners' sole reply to all arguments of past practice is that all of this was before the law was changed. Petitioners would have us conclude that Congress by preserving the legality of one traditional and historic practice, intended by implication to outlaw still another historic and, it would appear, equally venerable practice. We will not attribute such an intent to Congress nor de we feel that even petitioners really desire such a conclusion."

Respondents say that the analogy between project rates and the Conferences' rates is irrevelant "since the two rate schemes are different on their face." Respondents allege that "project rates permit the carriage at a lower rate of certain materials to be used only in a particular project." (FMC 15). But some project rates are issued for all projects of a particular government—quite a sizable chunk of general cargo in some countries—and other project rates relate to all cargo shipped to oil fields.

Again, this is a question of fact and assertions of fact by counsel are of limited utility for purposes of an adjudication. There needs to be an evidentiary record underlying any decision on such an issue.

Respondents next turn to petitioner's point that § 15 itself specifically exempts from its scope tariff rates agreed upon by approved conferences. The response of these respondents is extraordinary:

> "Congress inserted this clause, however, to permit *individual* rate changes by conferences without prior approval, H.R. 498, on H.R. 6775, 87th Cong. 1st Sess., p. 19" (FMC 18).

In its opening brief, petitioner pointed out that the Commission relies on exactly this citation for this point, representing that this was a statement of the House Merchant

Marine & Fisheries Committee. Petitioner pointed out that the quotation relied on by the Commission is a quotation from a letter of its predecessor, the Federal Maritime Board, appended to the House Report as a routine departmental report. The change in the draft bill which was made to this provision after the letter was submitted does not follow the suggestion made and is not relevant here.

Nevertheless, respondents again make the same citation for the same point without any explanation. Respondents again use the word "Congress" and again infer that they are citing a House Report when they are in reality citing an attachment thereto.

Moreover, respondents' explanation of the meaning of this portion of § 15 is little hard to follow. If Congress intended only to permit individual rate changes by Conferences without prior approval, is it suggested that approval must be obtained if five rates are changed? If ten rates are changed? If every rate in the tariff is increased by 10 per cent—a not infrequent occurrence? Clearly, Congress intended to exempt from § 15 tariff rates agreed upon by approved conferences, as the statute says. And accordingly, the Commission erred in finding that the rates set by the Conference were in violation of § 15.

Respondents then assert (FMC 18) that "because a proposed amendment affects rates, it is not automatically exempted from the section 15 filing requirements." The rates set by the Conference are not proposed amendments and they do not affect rates: they are rates. Respondents can cite no case where rates were held to be in an unfiled § 15 agreement. On the other hand, petitioner has cited *Empire State Highway Transportation Association* v. *Federal Maritime Board*, 110 U.S. App. D.C. 208, 291 F.2d 336 (D.C. Cir. 1961) which held that rates were not subject to § 15. Respondents' attempt to distinguish away the case on the grounds that what was involved there was a rate change whereas the present case is one of "an unapproved system of rate differentials based on the carrier flag" is not con-

vincing. What petitioner has filed with the Commission is a tariff of rates, not a system and not rate differentials.

Finally, it should be noted that petitioner pointed out in its opening brief, p. 24, that the fact that the rates set by the Conference are competitive and not anti-competitive was material and relevant to the § 15 issue and that it should have been granted an evidentiary hearing to show such facts on the record. Furthermore, petitioner pointed out, p. 29, that the Commission has held that § 15 is intended to cover only anti-competitive agreements. Respondents have chosen not to refer to this point.

Summary

It is clear that respondents concede that a hearing was required in this case since it is an adjudication required by statute, and § 7 of the Administrative Procedure Act [now 5 U.S.C. § 556(d)] applies. It is also clear from respondents' brief that there is a dispute as to the facts in this proceeding. The Commission was not authorized to issue its order without an evidentiary hearing and its order should not be allowed to stand.

§ 15 of the Shipping Act exempts from its scope rates set by approved conferences and the rates set by the Conference were clearly authorized by its § 15 agreement. Moreover, these rates are competitive and not anti-competitive in character. From the standpoint of the shippers, nothing has been changed in the Persian Gulf trade. The rates of the Conference for carriage on American flag vessels have not changed. There has been no significant change in the rates available to those who wish to use foreign flag vessels because the rates set by the Conference for carriage on foreign flag vessels are substantially the same as those already set in the trade by the 8900 group. All that has changed is that the shipper who wishes to use foreign flag vessels now has more services from which to choose.

The Commission's decision should not be allowed to stand.

Conclusion

For the foregoing reasons, petitioner prays that this Court:

1. Hold that the Commission report and final order of July 22, 1966 was without basis in law and contrary to Section 15 of the Shipping Act, 1916, as amended;

2. Vacate the Commission's decision and remand the decision to the Commission with instructions to hold a full evidentiary hearing in this proceeding before making a determination pursuant to Sections 15 and 22 of the Shipping Act, 1916.

3. Grant such other and further relief as the Court may deem appropriate.

Respectfully submitted,

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900 Seventeenth St., N. W.,
Washington 6, D. C.
of Counsel.

ADDENDUM

FEDERAL MARITIME COMMISSION

WASHINGTON 25, D. C.

IN REPLY REFER TO:

September 16, 1966.

Elmer C. Maddy, Esquire
Kirlin, Campbell & Keating
One Twenty Broadway
New York, New York 10005

Dear Mr. Maddy:

This is to acknowledge receipt of your letter of July 26, 1966, and to apologize for not responding sooner.

You request a copy of legislation proposed by the Commission and submitted for clearance within the executive branch. I am informed by the General Counsel of the Commission that proposed legislation is not available for public distribution while it reposes in the Bureau of the Budget. Accordingly, I cannot comply with your request.

Very truly yours,

/s/ THOMAS LISI
Thomas Lisi
Secretary

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,350

PERSIAN GULF OUTWARD FREIGHT CONFERENCE,

Petitioner,

v.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

ON PETITION TO REVIEW AN ORDER OF
THE FEDERAL MARITIME COMMISSION

DONALD F. TURNER
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IRWIN A. SEIBEL
RICHARD A. WEGMAN
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Department of Justice

Washington, D. C.
November 14, 1966

JAMES L. PIMPER
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Attorney

Federal Maritime Commission

QUESTIONS PRESENTED

1. Was the Commission's order of July 22, 1966, improper because the Commission has no authroity to issue a cease and desist order in this case without a full evidentiary hearing, under sections 15, 22 and 23 of the Shipping Act, 1916, as amended (46 U.S.C. §§ 814, 821, 822), sections 5 and 7 of the Administrative Procedure Act (5 U.S.C. §§ 1004, 1006), and the Commission's own Rules of Practice and Procedure (46 C.F.R. § 502.142)?

2. Was the Commission's decision of July 22, 1966, contrary to section 15 of the Shipping Act, 1916, in that it found that the Conference's rate structure was unanthroized by the Conference's approved agreement as a matter of law?

I N D E X

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES CITED

* Cases principally relied upon by respondents.

COUNTERSTATEMENT OF THE CASE

This is a petition to review a final order of the Federal Maritime Commission (Commission) issued and served on July 22, 1966, pursuant to the Shipping Act of 1916, c.451, 39 Stat. 728, as amended, 46 U.S.C. §801 et seq. (Act). The order was issued in the Commission's Docket No. 66-27, The Persian Gulf Outward Freight Conference (Agreement No. 7700) - Establishment of a Rate Structure Providing for Higher Rate Levels for Service via American-Flag Vessels versus Foreign-Flag Vessels. Jurisdiction to review the Commission's order is conferred on this Court by 28 U.S.C. §2341 et seq.

The Persian Gulf Outward Freight Conference is a conference of water carriers trading from United States Atlantic and Gulf ports to ports in the Persian Gulf and adjacent waters. The conference was composed of both American flag and foreign-flag ships until 1959 when the foreign-flag carriers withdrew and subsequently sought approval for their own ratemaking agreement, No. 8900, establishing a second ratemaking conference in the same trade. Agreement No. 8900 was approved by the Federal Maritime Commission pursuant to section 15 of the Act, 46 U.S.C. §814, and the Commission's order of approval was affirmed by this court in Persian Gulf Outward Freight Conference v. Federal Maritime Commission, ___U.S. App. D.C. ___, 361 F.2d 80 (D.C. Cir. 1966).

Petitioner basically derives its authority to set rates from its Agreement No. 7700, approved May 28, 1946. Article I of that agreement states:

> This agreement covers the establishment and maintenance of agreed rates, charges and practices for or in connection with transportation of cargo by members of his Conference.

On March 10, 1966, petitioner filed with the Commission "revisions" of its freight Tariff No. 8, F.M.C. No. 1, effective the following day. The "revisions" affected the rates on certain commodities already carried in the trade by providing for a two-level rate structure. One rate applied to shipments on American flag conference vessels, while another lower rate was charged for shipments on foreign-flag conference vessels. Petitioner has not filed the two-rate structure as an agreement or modification subject to Commission approval pursuant to the requirements of section 15 of the Act, which states:

> Sec. 15. That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

An order to show cause issued from the Commission on April 19, 1966, directing petitioner to show why the March 11, 1966, tariff "revisions" should not be declared unlawful and ordered stricken from the tariff. The proceeding was limited to the submission of memoranda of law and oral argument which took place before the Commission on June 22, 1966. On July 12, 1966, the Commission issued its report in Docket No. 66-27, which ordered petitioner to "cease and desist from carrying out the two-level system" until such time as it may be specifically authorized by an agreement approved by the Commission.. The two-level rates were found not to be authorized by any presently approved conference agreement and were therefore ordered stricken from the tariff.

A Petition for Review was filed with this court on July 26, 1966. The Commisssion was petitioned on July 26, 1966, for a stay of its order pending judicial review and, in the alternative, for a temporary stay of the order pending a ruling by this court on the Conference's application for an interlocutory injunction to restrain enforcement of the Commission's order until the hearing and determination of its Petition for Review. On August 2, 1966, the Commission granted a stay of its order only until such time as this court could consider and act on an application for stay and interlocutory injunction. The application was denied on August 30, 1966.

SUMMARY OF ARGUMENT

Petitioner, a conference of steamship carriers, failed to file for Commission approval an agreement which established a rate structure based on carrier flag. The Commission issued an order directing petitioner to show cause why the agreement should not be stricken. At the hearing on the order to show cause, the only issue before the Commission was whether or not the dual-level rate agreement was encompassed by the basic ratemaking agreement; if not, Commission approval would be required. During oral argument, petitioner was afforded an opportunity to file a memorandum of law suggesting any potential areas of factual dispute; as such, petitioner was accorded the statutory "hearing" prescribed by the Shipping Act. There were no unresolved factual disputes requiring that the Commission conduct an evidentiary hearing. The question whether the system satisfied statutory standards was not before the Commission, and evidence on this issue would have been premature.

The Commission's finding that petitioner's dual-level rate agreement was not covered by any Commission-approved ratemaking agreement, being a final determination, may be enforced through a cease and desist order. The Commission's authority to issue such orders has been upheld on many occasions.

Finally, the Commission properly concluded that petitioner's rate system was an unfiled and unapproved rate agreement which violated section 15 of the Act. The Commission correctly found that the rate structure did not fall within the statutory exemption for individual rate changes or interstitial rate schemes.

The Commission order on review should be affirmed.

ARGUMENT

I. SINCE THERE WERE NO UNRESOLVED FACTUAL ISSUES, THE COMMISSION'S ORDER WAS AUTHORIZED EVEN THOUGH A FULL EVIDENTIARY HEARING WAS NOT HELD.

Petitioner argues that a full evidentiary hearing was required to resolve the factual issues raised by the Commission's order to show cause. Absent the opportunity to present its evidentiary case, it is argued, no cease and desist order could issue against petitioner.

Respondents take the position that the Commission order was authorized and appropriate since petitioner was afforded a statutory hearing and there were no issues of fact which required an evidentiary hearing.

At the outset, it is noted that the Commission action was instituted, not under section 23 of the Act as petitioner maintains, but under section 22, 46 U.S.C. §821, and the Commission's Rule of Practice and Procedure 5(f), 46 C.F.R. §502.66. Rule 5(f) states:

> The Commission may institute a proceeding by order to show cause. The order shall be served upon all persons named therein, shall include the information specified in Rule 10(c), may require the person named therein to answer, and shall require such person to appear at a specified time and place and present evidence upon the matters specified.

See also, United States Navigation Company v. Cunard Steamship Co., 284 U.S. 474 (1932). Nevertheless, whether a section 23 order or not, it is conceded that a hearing is required, since this is an adjudication. Philadelphia Co. v. Securities and Exchange Commission, 84 U.S. App. D.C. 73, 175 F.2d 808

(D.C. Cir. 1949). The question is what sort of a hearing will suffice to meet the constitutional and statutory requirements?

Rule of Practices and Procedure 10(b), 46 C.F.R. §502.142, gives the Commission the authority to define the issues for its hearings and specifies that in proceedings "in which a hearing is required by statute, formal hearings shall be conducted pursuant to section 7 of the Administrative Procedure Act." Section 7, now 5 U.S.C. §556(d) states:

> . . . Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of facts . . . (Emphasis supplied).

But the section is not interpreted as requiring a full evidentiary hearing in all cases. In American Export & Isbrandtsen Lines v. Federal Maritime Commission, 334 F.2d 185 (9th Cir. 1964), the Ninth Circuit had before it an order issued by the Commission directing the Pacific Coast European Conference (PCEC) to show cause why a port equalization system, filed as an amendment to the general rules section of the conference freight tariff, should not be declared unlawful and stricken from the tariff. The administrative proceeding was limited to the submission of affidavits of fact and memoranda of law, but no affidavits were submitted. One of PCEC's arguments was that the Commission failed to conduct an evidentiary type hearing and make findings of

fact. The court found, inter alia, that there were no issues of fact raised in the order to show cause. Whether or not the proposed port equalization "amendment" was encompassed by the conference's basic tariff agreement was held to be only a question of law for Commission determination and the opportunity for the parties to submit memoranda of law and argue orally was held sufficient to satisfy the hearing requirement. The case is closely analagous to the one now before this court.

Quoted at length in American Export & Isbrandtsen is the opinion in Producers Livestock Marketing Association v. United States, 241 F.2d 192 (10th Cir. 1957), affirmed 356 U.S. 282 (1958). There, a public utility stockyard company issued a regulation which would restrict certain practices of marketing agencies. The Secretary of Agriculture concluded that the regulation was invalid and the stockyard company sought review. The appellate court framed the issues in terms of whether or not the regulation had any possible lawful application to the statutory duties imposed upon the company and the marketing agencies to furnish reasonable stockyard services. No determination could be made, the stockyard company argued, unless there was a "full hearing" in accordance with the provision of the governing act and regulations. However, the court found the regulation invalid on its face and answered petitioner's argument by saying:

> Although 9 C.F.R. 202.2(g) defines "hearing" to be "that part of the proceeding which involves the submission of evidence", it is fundamental to the law that the submission of evidence is not required to characterize "a full hearing" where such evidence is immaterial to the

> issue to be decided. In construing a similar provision of the Interstate Commerce Act, 49 U.S.C.A. §1 et seq., the Supreme Court has defined a full hearing as one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken. Akron, C. & Y. Ry. Co. v. United States, 261 U.S. 184, 43 S.Ct. 270, 67 L.Ed. 605. Where no genuine or material issue of fact is presented the court or administrative body may pass upon the issues of law after according the parties the right of argument. This was done in the instant case and coustitutes a "full hearing" for consideration of the limited contention made by the petitioner in its complaint and by its election not to submit evidence. 241 F.2d at 196.

The Commission on other occasions has invoked the show cause procedure in relation to section 15 violations and issued an order without an evidentiary hearing where there were no factual issues to be resolved. See, for example, In Re Pacific Coast European Conference, 7 F.M.C. 27 (1961); and Pacific Coast European Conference-Payment of Brokerage, 4 F.M.B. 696, 703 (1955); 5 F.M.B. 65, 72 (1956). Non-Commission cases which support the obvious conclusion that no evidentiary hearing is required where no factual disputes exist are NLRB v. J.R. Simplot Company, 322 F.2d 170 (9th Cir. 1963); Mississippi River Fuel Corp. v. Federal Power Commission, 108 U.S. App. D.C. 284, 281 F.2d 919, 927 (D.C. Cir. 1960), cert. denied, 365 U.S. 827 (1961); and Sun Oil Company v. Federal Power Commission, 256 F.2d 233 (5th Cir. 1958), cert. denied 358 U.S. 872 (1958).

Professor Davis also distinguishes between evidentiary hearings and agency adjudication of purely legal issues. He says:

Of great consequence is the rather elementary proposition that the method of trial is designed for resolving issues of fact, and that the method of argument, not the method of trial, is normally the appropriate oral process for resolving non-factual issues of law and policy and discretion . . . Curiously enough, this simple proposition is often misunderstood by both agencies and courts. Agencies sometimes develop non-factual issues of policy by having "witnesses" express argumentative opinions, and by having opposing counsel present argument in the form of cross-examination.

* * *

The method of trial is never required except when facts are in dispute. The true principle has been stated by the Tenth Circuit: "/I/t is fundamental to the law that the submission of evidence is not required to characterize 'a full hearing' where such evidence is immaterial to the issue to be decided . . . Where no genuine or material issue of fact is presented the court or administrative body may pass upon the issues of law after according the parties the right of argument." 1 Davis, Administrative Law, §7.01 (1958), quoting Producers Livestock Marketing Association v. United States, supra.

Petitioner cannot properly rely on the case of Morgan v. United States, 298 U.S. 468 (1936). That case, again involving the Packers and Stockyards Act, never considered the possibility of having a non-evidentiary hearing where there were no factual issues. Rather, where there was extensive evidence on the record, a "full hearing" was considered as requiring the Secretary of Agriculture to himself review and consider that evidence, and no other, since he was the one who made the administrative decision. Id. at 481. The case is factually inapposite.

Nor can petitioner rely on The Final Report of the Attorney General's Committee on Administrative Procedure, 1941. As petitioner stresses,

"(t)he forum itself must be one which is prepared to receive and consider all that he offers which is relevant to the controversy." But it is the Commission, not the petitioner, which is empowered to determine relevancy, Rule of Practice and Procedure 10(g), 46 C.F.R. §502.147, and in its Notice of Hearing, the Commission is instructed to inform petitioner of "the terms, substance, and issues involved, or the matters of fact and law asserted, as the case may be." (Emphasis supplied).

Petitioner makes much of the fact that the Commission's Report designates the issue before it a "legal" one. It seems clear, however, that the Commission's categorization of its finding as "legal" merely expresses its belief that no factual issues were raised which would require the introduction of evidence. If, in fact, there was no need to adduce additional facts through the taking and weighing of evidence, the Commission cannot be faulted for making an unauthorized "legal" determination. The ultimate conclusion of the Commission, therefore, should be given the weight traditionally accorded administrative decisions rooted in the Commission's view of the facts. International Packers, Ltd. v. Federal Maritime Commission, ___U.S. App. D.C. ___, 356 F.2d 808 (D.C. Cir. 1966).

Neither can it be maintained that this Court does not have before it a satisfactory record for review. Article 1 of the basic agreement, against which the conference's dual-level scheme is to be measured, is recited in the Commission's Report at (JA - 8). The nature of the dual-level agreement is also described in the Report as well as in petitioner's brief. No reason

has been suggested why the inclusion of the "revision" language itself would aid the court.

Petitioner's argument continues with a lengthy attack on the Commission's statutory authority to issue cease and desist orders without a full hearing before a violation of section 15 is found. It concludes that the statute's legislative history demonstrates that Congress chose to withhold pre-violation cease and desist authority despite vigorous Commission attempts to obtain the power. None of the quoted history treated the instant problem, however, since the Commission and Congress were concerned only with the authority to issue interim orders designed to preserve the status quo. So, in Trans-Pacific Freight Conference of Japan v. Federal Maritime Board, 112 U.S. App. D.C. 290, 302 F.2d 875 (D.C. Cir. 1962), cited by petitioner, this court held that the Commission had no statutory authority to issue a cease and desist order in advance of a determination on the merits as to whether a practice under an approved agreement constitutes a violation of the Act. This court specifically declined to express a view as to the Commission's authority to issue such an order prohibiting the use of an unapproved agreement, recognizing that different considerations might be involved. Id. at 879, footnote 8. Moreover, the present case is different from Trans-Pacific. First, here petitioner was attempting to carry out an unapproved agreement. Second, there was a violation of section 15 since it is unlawful to carry out an unapproved agreement. Third, the order issued in this case is not interlocutory or interim, but final since nothing more remained to be done by the Commission after it determined that there was no approved agreement with respect

to the dual level scheme. See brief for petitioner, p. 1; see also American Export & Isbrandtsen Lines v. Federal Maritime Commission, supra, approving the use of a similar show cause order as to the use of an unapproved agreement.

Given the right of the Commission to hold a non-evidentiary hearing where there are no factual disputes and given the Commission's authority to issue cease and desist orders when a conference is operating under an unapproved agreement, the only issue is whether this particular petitioner, in this particular proceeding had a right to present evidence in support of its position. We submit that it did not.

It must be emphasized that the Commission had a very narrow issue before it: Was the language of the basic agreement broad enough to encompass petitioner's dual-level system? The approvability of the system in a section 15 filing proceeding was not at issue for petitioner claims that no further approval is necessary since, in its view, the use of the system is authorized by the Commission's approval of the basic agreement. There was thus no issue before the Commission whether the system met the standards of section 15, i.e., whether the dual-level system was discriminatory or unfair as between carriers, operated to the detriment of the United States, or was contrary to the public interest. Had such been the issue, a full evidentiary hearing might well have been required.

II. THE COMMISSION CORRECTLY FOUND THAT THE TWO-LEVEL RATE SYSTEM WAS NOT WITHIN THE SCOPE OF PETITIONER'S BASIC CONFERENCE AGREEMENT AND THAT THE SYSTEM THEREFORE REQUIRED THE COMMISSION'S SEPARATE SPECIFIC APPROVAL.

The basic "coverage" provision in Article 1, Agreement No. 7700 states:

> This agreement covers the establishment and maintenance of agreed rates, charges and practices for or in connection with transportation of cargo by members of this Conference.

The Commission, in finding that the agreement did not encompass petitioner's system, cited five grounds established in earlier relevant cases for its conclusion, saying:

> Separate section 15 approval has been required by the Commission and its predecessors for arrangements (1) introducing an entirely new scheme of rate combination and discrimination not embodied in the basic agreement (the dual rate contract) /Isbrandtsen Company, Inc. v. United States, 93 U.S. App. D.C. 293, 211 F.2d 51 (1954), certiorari denied 347 U.S. 990, 74 S.Ct. 852, 98 L.Ed. 1124 (1954)/; (2) representing a new course of conduct (Prohibition of brokerage on a particular shipment) /American Union Transport v. River Plate & Brazil Conferences, 5 F.M.B. 216, 221 (1957), aff'd sub nom. American Union Transport v. United States, 103 U.S. App. D.C. 229 certiorari denied, 358 U.S. 828, 79 S.Ct. 46, 3 L.Ed. 6 (1958) 257 F.2d 607, 613 (1958)/; (3) providing new means of regulating and controlling competition (port equalization system) /American Export and Isbrandtsen Lines v. Federal Maritime Commission, supra/; (4) not limited to the pure regulation of intraconference competition /Id/; or (5) constituting an activity the nature and manner or effectuation of which cannot be ascertained by a mere reading of the basic agreement /Joint Agreement - Far Eastern Conference and Pacific Westbound Conference, 8 F.M.C. 553, 558/ (Footnotes included).

Petitioner does not challenge these grounds, if applicable, as bases for a conclusion that a new tariff arrangement cannot be effectuated as part of a blanket ratemaking agreement such as its "coverage" language. Presumably, these court-tested criteria are valid standards to guide the Commission. Application of but one of these guidelines is sufficient to invalidate the "revisions". The Commission found all five to be applicable to petitioner's dual-level system. However, petitioner sought to remove its system from the scope of at least some of the earlier Commission decisions which held a rate system unapproved if it constituted a "new" course of conduct. See Isbrandtsen Co., Inc., v. United States, 93 U.S. App. D.C. 293, 211 F.2d 51 (D.C. Cir. 1954), cert. denied, 347 U.S. 990 (1954). At the oral argument before the Commission, petitioner's counsel stated:

> If it introduces an entirely new scheme or rate combination and discrimination not embodied in the basic agreement, it represents a new course of conduct, a new arrangement for the regulation and control of competition -- not limited to the pure regulation of intra-conference competition, or constitutes an activity, the nature of which cannot be ascertained by a mere reading of the basic agreement -- yet, I submit to you the mere recital of these tests to determine whether there is a Section 15 violation show that many, if not all of them, raise factual issues. A hearing would develop that the adoption of these rates are not an entirely new scheme of rate combination and discrimination. These types of rates have been utilized previously in this trade by the Kulukundis -- this is developed in the record in 1079. They have been utilized on occasion in the India trade. I also believe that prior to World War II in the North Atlantic trade the conference maintained a two-level rate system based upon the type of ship involved. (JA - 30).

Even if the "new scheme" test were the sole criterion for determining the necessity of filing an agreement or modification for approval, which it is not, petitioner was not denied an opportunity to demonstrate to the Commission that as a matter of fact its dual level arrangement was not new. In its Reply to Order to Show Cause (JA 27), the conference referred to Commission Docket No. 1079 and suggested that testimony therein indicated that a similar rate structure had been established earlier by another conference. The alleged conference referred to in Docket No. 1079 was Kulukundis and was discussed in the transcript (JA 30). On rebuttal, however, hearing counsel demonstrated the irrelevance of petitioner's reference by pointing out that Kulundis consisted of two independent corporations, one American flag, one foreign. Kulukundis was not even a conference (JA 30, 42).

Petitioner also suggested in its brief and on argument that there was no new scheme as a matter of fact because a scheme of "project rates" had been allowed by the Commission without having to be filed for approval. (JA 28-31). Project rates permit the carriage at a lower rate of certain materials to be used only in a particular project. The suggestion of a factual dispute by analogy is also irrelevant since the two rate schemes are different on their face and, as the Commission noted, the purported approval of project rates was nothing more than a comment on their existence in an examiner's fact finding investigation (JA 39).

Indeed, an examination of the cases which have considered the inclusion of unapproved agreements as amendments to approved agreements discloses that there have been few areas of dispute conducive to evidentiary hearings. In

the American Export & Isbrandtsen case, supra, for example, no party took advantage of the opportunity to submit affidavits of fact. In the present matter, the Commission was apprised of no real factual controversies although the oral argument indicates that petitioner was given an opportunity to do so. Although Chairman Harllee questioned petitioner's counsel at length concerning the cases raised by hearing counsel in which conference agreements were required to be filed for approval rather than included as amendments to existing agreements (JA - 35, 41), no suggestion was made as to what might be proved through an evidentiary proceeding. Petitioner merely persisted in an unreasoned assertion that such a hearing would disclose facts which would remove its system from the scope of the Commission decisions.

Moreover, the language in Isbrandtsen Co. Inc. v. United States, Id. is appropriate:

> "Agreements" referred to in the Shipping Act are defined to include "understandings, conferences, and other arrangements." Clearly, a scheme of dual rates like that involved here is an "agreement" in this sense. It can hardly be classified as an interstitial sort of adjustment since it introduces an entirely new scheme of rate combination and discrimination not embodied in the basic agreement. But even if it were not a new agreement, it would certainly be classed as a "modification" of the existing basic agreement. In either case, §15 requires that such agreements or modifications "shall be lawful only when and as long as approved" by the Board. Until such approval is obtained, the Shipping Act makes it illegal to institute the dual rate system. 211 F.2d at 56.

The Commission has held that routine day-to-day activities of the Commission need not be separately filed under section 15. See Ex Parte 4,

Section 15 Inquiry, 1 U.S.S.B. 121, 125 (1927); Joint Agreement Between Member Lines of the Far East Conference and the Member Lines of the Pacific Westbound Conference, 8 F.M.C. 553 (1965). Petitioner's conduct on its face can hardly be said to be a routine activity, however. The dual level scheme had never been used by petitioner, or apparently anyone else. Further, it contemplated two entirely separate rate structures based on the carrier flag and was designed to affect non-intraconference competition. It could hardly be regarded as a mere interstitial change to petitioner's approved and effective rate scheme.

The Commission simply held that petitioner's dual level system was an agreement which had not been filed and approved under section 15. Implementation of unfiled agreements is expressly made unlawful by the statute. Petitioner argues, however, that section 15 permitted the use of the dual-level system as a tariff rate, without filing and approval, basing their argument upon the following statutory language:

> . . . except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 14b of this Act which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 18(b) hereof and with the provisions of any regulations the Commission may adopt.

Congress inserted this clause, however, to permit individual rate changes by conferences without prior approval, H.R. 498, on H.R. 6775, 87th Cong. 1st

Sess., p. 19. Petitioner's system does not simply provide for individual rate changes, but rather an entire structure of rates incorporating an unprecedented dual-level approach, based on carrier flag. Moreover, the cases cited in the Commissioner's Report are consistent with the concept that merely because a proposed amendment to an agreement affects rates, it is not automatically exempted from the section 15 filing requirements. As Chairman Harllee pointed out at the hearing, the port equalization system described in American Export and Isbrandtsen Lines v. Federal Maritime Commission, supra, was also designed to affect rates. (JA - 38). Nevertheless the system was not exempted from the filing requirements.

Petitioner relies on Empire State Highway Transportation Association v. Federal Maritime Board, 110 U.S. App. D.C. 208, 291 F.2d 336 (D.C. Cir. 1961) which held that a particular modification of a rate need not be filed for approval. That case, however, involved a rate change and not an unapproved system of rate differentials based on the carrier's flag. Moreover, the court cited Isbrandtsen Co., Inc. v. United States, supra, and commented that "a conference agreement is not a canopy under which to inaugurate without prior Board approval a dual contract system of charges or rates. As the Board argues, 'A tariff change and modification of the basic agreement may sometimes be a matter of degree.'"

In sum, the Commission decided only the narrow question of whether the dual-level system was encompassed by the general "coverage" of the basic agreement. It concluded that the scheme was not. Since petitioner's scheme was not excepted under section 15, there was a violation of that statute.

CONCLUSION

For the reasons stated above, the order under review should be affirmed.

Respectfully submitted,

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